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2978

No. 15183

**United States
Court of Appeals**
for the Ninth Circuit

HERBERT CAMPOS,

Appellant,

vs.

CARL E. OLSON, Also Known as CARL "BOBO"
OLSON; SID E. FLAHERTY and SID
FLAHERTY PROMOTIONAL ENTER-
PRISES, a Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

OCT 18 1956

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for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Counsel for Appellees.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 34693

HERBERT CAMPOS,

Plaintiff,

vs.

CARL E. OLSON, Also Known as CARL "BOBO"
OLSON; SID E. FLAHERTY; SID FLAHERTY
PROMOTIONAL ENTERPRISES, a
Corporation; FIRST DOE to TWENTIETH
DOE, Inclusive; DOE PARTNERSHIP, a Co-
Partnership; DOE ASSOCIATION, an Unin-
corporated Association, and DOE CORPORA-
TION, a Corporation,

Defendants.

COMPLAINT ON CONTRACT FOR RECOVER-
Y OF DAMAGES AND FOR DECLARA-
TORY RELIEF

Comes now the plaintiff, Herbert Campos, and
complaining of the above named defendants, and
each of them, alleges as follows:

I.

The plaintiff, Herbert Campos, is now, and con-
tinuously during all the times herein mentioned has
been, a resident of the City and County of Honolulu,
Territory of Hawaii, and a citizen of the Territory
of Hawaii.

II.

The defendant Carl E. Olson, also known as Carl "Bobo" Olson, and hereinafter referred to as "Olson," is now, and continuously since on or about June 27, 1951 has been, a resident and citizen of the State of California, being now a resident of the County of San Mateo, said state; and the defendant Sid E. Flaherty, hereinafter referred to as "Flaherty," is now and continuously during all the times herein mentioned has been, a resident of the City and County of San Francisco, State of California, and a citizen of the State of California.

III.

The defendant Sid Flaherty Promotional Enterprises is now, and has been continuously since its organization on or about June 9, 1954, a corporation organized and existing under and by virtue of the laws of the State of California and a citizen of said state, with its principal office and place of business in the City and County of San Francisco, State of California.

IV.

This is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

V.

The defendants First to Twentieth Doe, inclusive, Doe Partnership, a co-partnership, Doe Association, an unincorporated association, and Doe Corporation, a corporation, are the representatives or duly au-

thorized agents of the defendants Olson, Flaherty or Sid Flaherty Promotional Enterprises in connection with the matters hereinafter alleged or are parties to the hereinafter mentioned agreements or persons responsible thereunder. None of said defendants is a resident of the Territory of Hawaii or a citizen of said Territory. Said defendants are sued herein by such fictitious names for the reason that plaintiff does not know their true names or capacities whether individual, corporate, associate or otherwise, and plaintiff prays that when the true names and capacities of said defendants, or any of them, are ascertained he be permitted to amend this complaint to set forth the same together with appropriate allegations showing the connection of such defendants with the subject matter of this action.

VI.

On or about July 14, 1948, the defendant Carl E. Olson, also known as Carl "Bobo" Olson, entered into a written agreement with plaintiff, a true copy of which is annexed hereto, marked Exhibit A, and is hereby expressly referred to and by such reference incorporated herein as fully as though set forth at length. Said agreement was so made and entered into and delivered by said parties in the City and County of Honolulu, Territory of Hawaii, both the said Olson and plaintiff then being residents of said Territory.

VII.

Subsequently on or about July 20, 1949, the said defendant Olson entered into a further written

agreement with plaintiff, a true copy of which is annexed hereto, marked Exhibit B, and is likewise hereby referred to and by such reference incorporated herein as fully as though set forth at length. Said further agreement of July 20, 1949, was also made and entered into and delivered by said parties in the City and County of Honolulu, Territory of Hawaii, of which they were then both residents.

VIII.

At the times said agreements, Exhibits A and B hereto, were so entered into by said parties, the defendant Olson was, and he now is, a professional boxer possessing extraordinary, exceptional and unique ability and skill in his said calling and the services agreed to be rendered by the said Olson under said agreements were and are extraordinary, exceptional and unique. Under and by virtue of said agreements the said Olson agreed, among other things, to render such services under the sole and exclusive management, direction and control of plaintiff for a total period of ten years from July 20, 1949, namely, until July 19, 1959, and further promised and agreed that he would not during the term of said agreements take part in any boxing contest or otherwise exploit or exercise his talents in any manner or place except as directed by plaintiff; and it was further agreed by said parties that the net proceeds from the services so required to be rendered by the said Olson under the management, direction and control of plaintiff, as aforesaid,

should be divided $66\frac{2}{3}\%$ to the said Olson and $33\frac{1}{3}\%$ to plaintiff.

IX.

Said agreements, Exhibits A and B hereto, were duly filed with the Territorial Boxing Commission of the Territory of Hawaii and on or about July 14, 1948, plaintiff was duly and regularly licensed by said Commission as the manager of the said Olson as required by the statute of the Territory of Hawaii in such case made and provided, to wit: Chapter 145, Revised Laws of Hawaii, 1945, as amended, Sections 7561 and 7562, and plaintiff continued to remain so licensed during all the times herein mentioned until on or about December 31, 1953; and during all of said time until on or about June 27, 1951, when the said Olson refused to further perform said agreements and entirely repudiated the same as is hereinafter alleged, plaintiff was recognized as the legally licensed manager of the said Olson by said Territorial Boxing Commission and by the National Boxing Association of which it was and is a member and plaintiff was so recognized and was duly and regularly licensed as the manager of the said Olson in all other jurisdictions in which he and the said Olson appeared.

X.

Upon the execution of said agreement, Exhibit A hereto, on or about July 14, 1948, as aforesaid, plaintiff immediately entered into and upon performance of the same and continued to perform said agreement and the further agreement of July

20, 1949, Exhibit B hereto, until on or about June 27, 1951, when the defendant Olson wrongfully and without just cause or excuse repudiated and breached said agreements by leaving plaintiff's management and placing himself under the management of the defendant Flaherty in San Francisco and by continuously ever since on or about July 9, 1951, performing as a professional boxer in various boxing contests and exhibitions under the exclusive management, direction and control of the said Flaherty in violation of his aforesaid agreements with plaintiff. Continuously ever since on or about June 27, 1951, the said defendant Olson has failed and refused and does now fail and refuse to further perform his said agreements with plaintiff, Exhibits A and B hereto, or any of the terms or conditions thereof required on his part to be done or performed and said defendant has conducted himself and is now conducting himself as not being in any manner obligated under said agreements or bound thereby.

XI.

Plaintiff has at all times performed all the terms, conditions and agreements on his part to be done or performed under his said agreements with the defendant Olson, Exhibits A and B hereto, in the manner and at the times therein specified, until prevented from such further performance by the aforesaid wilfull and wrongful conduct on the part of the said Olson in repudiating and breaching said agreements. During the year 1949 under plaintiff's management Olson for the first time achieved recog-

dition as a ranking contender for the middleweight championship of the world and during the year 1950 plaintiff procured matches, among others, for the said Olson with one Dave Sands, middleweight champion of the British Empire and a top ranking contender for the middleweight championship of the world, and with one "Sugar" Ray Robinson for the middleweight championship of the world as recognized in the State of Pennsylvania, as the result of which contests the said Olson at the end of the year 1950 under plaintiff's management was further recognized as a contender for the middleweight championship. At all times herein mentioned plaintiff has been and now is ready, able and willing to perform all terms, conditions and agreements on his part to be performed under said agreements of July 14, 1948, and July 20, 1949, Exhibits A and B hereto.

XII.

Prior to on or about October 11, 1950, the said defendant Flaherty and one Maurice Lipton, also known as Moe Lipton, made certain claims to managerial rights over the said Olson based on a purported contract dated September 18, 1945, between Lipton and said Olson, who was then a minor, and a further purported contract dated September 26, 1949, entered into between Olson and the said Flaherty with knowledge on the part of the said Flaherty that Olson was already under contract with plaintiff. On or about said October 11, 1950, at a meeting held before representatives of the State Athletic Commission of the State of California at

its office in San Francisco, plaintiff and the said Olson on the one side and the said Flaherty acting for himself and as attorney in fact for the said Lipton on the other, entered into a written agreement settling said claims pursuant to which the said Flaherty on or about October 23, 1950, executed and delivered a written release to the said Olson on behalf of himself, a true copy of which is annexed hereto, marked Exhibit C, and is hereby expressly referred to and by such reference made a part hereof, and a further written release on behalf of the said Lipton, a true copy of which is annexed hereto, marked Exhibit D, and is likewise hereby referred to and by such reference made a part hereof. Said releases were intended and understood by all of said parties to fully release and extinguish any and all claims on the part of the said Flaherty or the said Lipton to the management of the said Olson.

XIII.

The said defendant Olson since his breach and repudiation of his agreements with plaintiff, Exhibits A and B hereto, as aforesaid, has wilfully and wrongfully participated in and continues to participate in boxing contests and exhibitions under the exclusive management of the defendant Flaherty without regard to his agreements with plaintiff and in continual violation thereof and although demand has been made therefor, the said Olson has refused and continues to refuse to pay to plaintiff his agreed share of the net receipts from such boxing contests and exhibitions. Plaintiff is informed

and believes and therefore alleges the fact to be that commencing with July 9, 1951, and until December 31, 1954, the gross receipts received by Olson and Flaherty and by the defendant corporation, Sid Flaherty Promotional Enterprises, as hereinafter alleged, from such boxing contests and exhibitions so participated in by the said Olson have totalled \$485,680.77; their expenses have totalled \$58,582.25; and the 33 $\frac{1}{3}$ % share of net receipts to which plaintiff is entitled under said agreements amounts to the total sum of \$142,366.17. Plaintiff does not know nor has he been able to ascertain the exact amount of said receipts and expenses nor the amount due to him as his share of net receipts so far for the year 1955 but in this respect plaintiff is informed and believes and therefore alleges the fact to be that the gross receipts received by defendants from a boxing contest between the said Olson and one Willie Vaughn on or about March 12, 1955, in Los Angeles amounted to \$11,235.70 and further that the gross receipts from a boxing contest with one Joey Maxim held in San Francisco on April 13, 1955, amounted to \$34,311.10. Plaintiff alleges that an accounting by all of said defendants including said corporate defendant will be necessary to determine the exact amount due plaintiff under said agreements, Exhibits A and B hereto, and plaintiff is further informed and believes and therefore alleges the fact to be that such accounting will disclose that plaintiff is entitled to a sum in excess of \$155,000.00 as his share of said net receipts.

XIV.

Plaintiff is further informed and believes and therefore alleges the fact to be that continuously since the organization of the defendant corporation Sid Flaherty Promotional Enterprises on or about June 9, 1954, as aforesaid, and specifically commencing with a boxing contest between the said Olson and one Rocky Castellani held in San Francisco on or about August 20, 1954, the entire gross receipts from Olson's appearances including all amounts paid for television and radio rights have been paid to said defendant corporation and not directly to the said Olson or Flaherty. Plaintiff is further informed and believes and therefore alleges the fact to be that said corporation is now holding the large majority of said proceeds for the benefit of the said Olson and Flaherty or for their benefit together with other persons unknown to plaintiff; that at all times herein mentioned since its organization, as aforesaid, the defendant corporation has had full notice and knowledge of the aforesaid agreements between plaintiff and the defendant Olson, Exhibits A and B hereto, and of plaintiff's rights thereunder, but nevertheless despite such notice and knowledge and at the instance of the defendant Flaherty the said Olson and the defendant corporation Sid Flaherty Promotional Enterprises have entered into a further purported agreement under which Olson has been performing ever since on or about August 20, 1954, and is now performing as a professional boxer for said corpo-

ration in violation of his aforesaid agreements with plaintiff; and that said defendant corporation is now withholding and is continuing to withhold from plaintiff a substantial portion of the moneys due plaintiff under said agreements, Exhibits A and B hereto.

XV.

By reason of the premises plaintiff has been generally damaged in the sum of \$250,000.00.

And for a Further and Separate Second Count or Cause of Action, Plaintiff Alleges:

I.

Plaintiff refers to Paragraphs I to XIV, inclusive, of his first count or cause of action alleged herein and by such reference adopts the same and incorporates each and all of the allegations thereof as part of this second count or cause of action as fully as though set forth at length herein.

II.

Prior to on or about the month of February, 1951, the defendant Sid E. Flaherty knew of the aforesaid agreements between plaintiff and the defendant Carl E. Olson, also known as Carl "Bobo" Olson, Exhibits A and B hereto, and knew that under the terms of said agreements the defendant Olson had bound himself to perform as a professional boxer under the exclusive management and direction of plaintiff until July 19, 1959. Notwithstanding such knowledge and with the intent to deprive plaintiff of the services of the said Olson and

the benefits of said agreements, Exhibits A and B hereto, and to obtain such services and benefits for himself, the defendant Flaherty on or about June 27, 1951, and prior thereto with knowledge of said agreements, did knowingly, wilfully, wrongfully and without justification induce the said Olson to breach his said agreements with plaintiff and to perform and participate in boxing contests and exhibitions under the management and direction of the said Flaherty and apart from the management and direction of plaintiff. The interference by the defendant Flaherty and by the defendant Sid Flaherty Promotional Enterprises since its organization on or about June 9, 1954, as aforesaid, with the contractual relationship between plaintiff and the defendant Olson was active and intentional and done with knowledge of the obligations of the said Olson to plaintiff under said agreements, Exhibits A and B hereto, and has continued to date and has deprived plaintiff of the benefits of his said agreements from on or about June 27, 1951, to date and threatens to deprive plaintiff of the benefits of said agreements for the duration of the term thereof.

III.

By reason of the aforesaid wrongful interference by said defendants Sid E. Flaherty and Sid Flaherty Promotional Enterprises with plaintiff's agreements with the defendant Olson and by reason of their knowingly and wrongfully depriving plaintiff of the benefits of said agreements and the serv-

ices of the said Olson, plaintiff has been damaged in the sum of \$250,000.00.

And for a Further and Separate Third Count or Cause of Action, Plaintiff Alleges:

I.

Plaintiff refers to Paragraphs I to XIV, inclusive, of his first count or cause of action alleged herein and by such reference adopts the same and incorporates each and all of the allegations thereof as part of this third count or cause of action as fully as though set forth at length herein.

II.

Since the breach and repudiation of said agreements, Exhibits A and B hereto, by the defendant Olson on or about June 27, 1951, as aforesaid, the said Olson has continuously to date engaged in boxing contests and exhibitions in total disregard of the rights of plaintiff under said agreements and continues and threatens to continue to so engage in boxing contests and exhibitions in disregard of plaintiff's rights, all to the irreparable damage of plaintiff.

III.

An actual controversy exists within the jurisdiction of this Court between plaintiff and said defendants relating to the legal rights and duties arising out of said agreements, Exhibits A and B hereto.

Wherefore, plaintiff prays

1. for judgment in the amount of \$250,000.00 damages against the defendant Carl E. Olson, also known as Carl "Bobo" Olson, on the first count or cause of action alleged herein;

2. or in lieu thereof that an accounting be had to determine plaintiff's share of the net receipts accruing to defendants, Carl E. Olson, also known as Carl "Bobo" Olson, and Sid E. Flaherty since June 27, 1951, and for judgment thereon; and for a declaratory judgment ordering and decreeing that plaintiff is entitled to $33\frac{1}{3}\%$ of the net proceeds of all boxing contests, exhibitions and performances participated in by the defendant Olson until July 19, 1959, and further adjudicating and declaring the respective rights and duties and other legal relations of the parties to the aforesaid agreement, Exhibits A and B hereto;

3. for judgment against defendants Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a corporation, in the amount of \$250,000.00 damages on the second count or cause of action alleged herein;

4. for interest on the judgment herein at the legal rate;

5. for plaintiff's costs of suit herein incurred; and

6. for such other and further relief as to this Court may seem meet and equitable in the premises.

Dated: June 6, 1955.

/s/ WEBSTER V. CLARK,
WEBSTER V. CLARK,
LAWRENCE W. JORDAN, JR.,
ROGERS and CLARK,
ERNEST O. MEYER,

By /s/ WEBSTER V. CLARK,
Attorneys for Plaintiff.

EXHIBIT A

Memorandum of Agreement

Made this 14th day of July, 1948, between Herbert Campos, of the City and County of Hon., Territory of Hawaii, hereinafter referred to as Manager, party of the first part, and Carl E. Olson, ring name Carl "Bobo" Olson, of Honolulu aforesaid, hereinafter referred to as Athlete, party of the second part.

[Stamp]: Approved: Date 7/19/48.

TERRITORIAL BOXING
COMMISSION,

By WILLIAM KIM.

[Stamp]: Received July 16, 1948.

TERRITORIAL BOXING
COMMISSION,

By WILLIAM KIM.

Witnesseth: Expires 7/18/53.

In consideration of the covenants and conditions hereinafter contained, the parties hereto agree as follows:

1. The Manager herewith engages the Athlete and the Athlete agrees for a period of 5 years from date of approval by the Territorial Boxing Commission of Hawaii, to render services solely and exclusively for the Manager in such boxing contest, exhibitions of boxing, training exercises, whenever required by the Manager in the Territory of Hawaii and elsewhere the Manager may from time to time direct.

2. The Manager agrees that the Athlete shall receive $66\frac{2}{3}$ per cent of all sums of money derived by him from any services that the said Athlete may render hereunder.

3. The Manager agrees to use his best efforts to secure remunerative boxing contests and exhibitions for the Athlete.

4. The Athlete agrees to faithfully fulfill any contract entered into on his behalf by the Manager during the term hereof.

5. The Athlete agrees that he will not during the continuance of this contract take part in any boxing contests or other exhibitions, perform or otherwise exercise his talent in any manner or place except as directed by the Manager, and shall not allow his name to be used in any commercial enterprise whatsoever without first obtaining the permission of his Manager so to do.

6. The Athlete shall attend to all training exercises, as the Manager shall require, and shall proceed and travel by all boats, airplanes and other means of conveyance as and when required by the Manager for the purpose of this agreement.

7. It is understood and agreed by and between the parties hereto that the services of the Athlete are extraordinary, exceptional and unique.

8. Controversies arising between the parties hereto shall be referred and submitted to arbitration in the following manner:

Within two (2) weeks after the origin of such dispute or controversy, either or both of the parties hereto may notify the Territorial Boxing Commission of the existence of such dispute and of his, or their, desire and willingness to refer such dispute to arbitration, whereupon the Territorial Boxing Commission shall appoint a disinterested Commissioner or other person to conduct a hearing at such time and place as may in the opinion of the Commission be convenient to all interested parties and witnesses; notification of the time and place of such hearing shall be given to all interested persons at their last known places of address. The parties hereto agree in the event of submission of any such controversy to arbitration, that the decision of such arbitrator shall be final and binding upon the parties hereto and each of them agree to be bound thereby.

9. It is further understood and agreed that if First Party shall be suspended by the Territorial Boxing Commission of Hawaii, as Manager, and such suspension shall be permanent, this contract insofar as it relates to contests and/or exhibitions in the Territory of Hawaii, at the option of the Second Party, shall forthwith cease and terminate during such suspension.

10. For the duration of any permanent or temporary suspension, Second Party may contract individually or with any other manager for his services during said period, and during such period of suspension First Party shall not be entitled to any of the proceeds of Second Party earned by him, in the Territory of Hawaii.

11. This contract is not valid until approved by the Territorial Boxing Commission of Hawaii.

12. This contract is null and void if during its term the Manager is not duly licensed by this Commission.

As Witness the Hands and Seals of the Parties Hereto:

Party of the first part:

HERBERT CAMPOS.

Party of the second part:

CARL E. OLSON.

Territory of Hawaii, City and
County of Honolulu—ss.

On this 14th day of July, 1948, before me came Herbert Campos and Carl E. Olson to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they each duly acknowledged to me that they executed the same.

[Seal] HENRY H. WONG,
First Judicial Circuit,
Territory of Hawaii.

My commission expires June 30, 1949.

Any contract between a minor boxer and a manager must be accompanied by the approval of the Circuit Court.

EXHIBIT B

Liber 2244 Page 442

Agreement

Made this 20th day of July, 1949, by and between Herbert Campos of the City and County of Honolulu, Territory of Hawaii, Party of the First Part, and Carl E. Olson of the City and County of Honolulu, Territory of Hawaii, Party of the Second Part.

Witnesseth

1. That the said Party of the Second Part, for and in consideration of the sum of \$1.00 (One Dol-

lar) and other valuable consideration to him in hand paid by said Party of the First Part, the receipt whereof is hereby acknowledged, agrees to, and by these presents does hereby, place himself under the management and supervision of the said Party of the First Part, and also agrees to, and by these presents does hereby, obligate himself to take part in any and all such boxing contests, athletic exhibitions and other contests of physical skill, science and strength, and also to give exhibitions of boxing, training and training exercises, and also to act and perform as a comedian, actor or otherwise, in motion pictures, vaudeville and theatrical performances whenever and wherever required by the said Party of the First Part, in such places of private and public amusement and entertainment and in such cities and towns or other places in the continents of North and South America, Europe, Asia, Africa, Australia, and in such cities and towns of New Zealand, Philippines, Japan, Dutch East Indies, Territory of Hawaii and elsewhere, where the Party of the First Part, his managers, may from time to time request and direct.

2. It is further understood and agreed, that the said Party of the First Part hereby engage the sole professional services of the said Party of the Second Part to take in all such boxing contests, vaudeville and theatrical performances and otherwise to the best of his skill and ability, at such times and places as aforesaid, that may be required and directed by the said Party of the First Part.

3. In consideration of this Agreement it is understood and agreed that said Parties hereby mutually bind themselves for a period of Ten (10) Years, beginning the 20th day of July, 1949, and terminating on the 19th day of July, 1959, and for which said period of Ten Years, this contract and agreement shall remain in full force and effect and be absolutely binding upon the respective parties hereto.

4. It is further understood and agreed that said Party of the First Part shall use his best efforts and endeavors to secure appropriate and remunerative boxing contests, exhibitions, physical contests, motion picture, vaudeville and theatrical performances for the Party of the Second Part, during the term of this agreement.

5. It is understood and agreed that the net proceeds of all boxing contests, exhibitions and contests and performances herein mentioned in this Agreement performed in the United States of America and in all foreign nations by said Second Party herein mentioned shall be divided as follows:

Thirty-three and one-third per cent ($33\frac{1}{3}\%$) to the Party of the First Part, and sixty-six and two-third per cent ($66\frac{2}{3}\%$) to the Party of the Second Part in all states and foreign countries and dominions except in those states and dominions which provide by law for a maximum percentage allowed by law to a manager.

6. The said Party of the Second Part hereby promises and agrees to faithfully fulfill, live up to, and carry out the terms and conditions of any and all contracts entered into for and on his behalf by the said Party of the First Part during the period and term covered by this Agreement, and the said Party of the Second Part does hereby make and constitute the said Party of the First Part his true and lawful attorney, irrevocable, in their names, or otherwise, to collect and receive and receipt for any and all sums of money from any persons, firms, corporations, clubs or associations of every kind and nature wherever located or resident within the United States of America, or any other part of the world.

7. The Party of the Second Part hereby binds himself and promises and agrees that he shall, and will not during the term of this Agreement, take part in any boxing contest, athletic contest, or act, perform, or otherwise exploit or exercise his talents in any manner, shape or form whatsoever, or in any place, wheresoever, except as directed by said Party of the First Part.

8. It is agreed that the said Party of the Second Part shall attend such rehearsals and attend to all training and exercises as the said Party of the First Part shall require, and proceed and travel by all boats, trains and other means of conveyance, as and when required, by the Party of the First Part, for the purpose of carrying out the terms of this Agreement.

9. It is further understood and agreed by and between the respective parties hereto that the services of the said Party of the Second Part are exceptional, extraordinary and unique and that this contract shall not be terminated except by mutual consent of the respective parties hereto in writing or by a decree of court.

10. It is further understood and agreed that, if from time to time any portion of this agreement is found to be unlawful in any locality, the performance of such unlawful portion may be waived by the Party to whom performance is due and the remaining portions of this contract shall remain in full force and effect.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

HERBERT CAMPOS,
Party of the First Part.

CARL E. OLSON,
Party of the Second Part.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 20th day of July, 1949, before me personally appeared Herbert Campos and Carl E. Olson to me known to be the persons described in and who executed the foregoing instrument and acknowl-

edged that they executed the same as their free act and deed.

[Seal] HENRY H. WONG,
Notary Public, First Judicial Circuit, Territory
of Hawaii.

My commission expires June 30, 1953.

I do hereby certify that the words "Party" in the last line on Page 1, "on" in line 10 on Page 2, "Second" in line 26 on Page 2, and "and" in line 10 on Page 3, were erased and corrected prior to execution and acknowledgment.

 HENRY H. WONG,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1953.

Entered of record this 22nd day of July, A.D.
1949, at 10:45 o'clock a.m. and compared.

 MARK N. HUCKSTEIN,
Registrar of Conveyances.

By /s/
Clerk.

EXHIBIT C

Release

Know All Men By These Presents:

That I, Sid Flaherty, of San Francisco, California, do hereby release, remise and forever discharge Carl E. Olson, of Honolulu, his heirs, executors, and administrators of and from all and all manner of actions, causes of action, suits, proceedings, debts, dues, contracts, judgments, damages, claims, and demands whatsoever in law or equity, which against the said Carl F. Olson I ever had, now have, or which my heirs, executors, or administrators hereafter can, shall, or may have for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of these presents.

In particular I release the said Carl F. Olson from any managerial contract I may hold with the State Athletic Commission as manager of said Carl F. Olson, a boxer.

In Witness Whereof, I have hereunto set my hand and seal the 23rd day of October, 1950.

SID FLAHERTY.

Witness:

[Seal] ERNEST O. MEYER,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires October 4, 1952.

EXHIBIT D

Release

Know All Men By These Presents:

That I, Sid Flaherty, attorney in fact for Maurice Lipton, do hereby release, remise and forever discharge Carl F. Olson of Honolulu, his heirs, executors, and administrators, of and from all and all manner of actions, causes of action, suits, proceedings, debts, dues, contracts, judgments, damages, claims, and demands whatsoever in law or equity, which against the said Carl F. Olson I ever had, now have, or which my heirs, executors, or administrators hereafter can, shall, or may have for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of these presents.

In particular, I, the said Sid Flaherty, attorney in fact for Maurice Lipton, release the said Carl F. Olson from any managerial contract or contracts heretofore executed by Carl F. Olson, boxer, and Maurice Lipton, his manager, and in particular the contract entered into the 18th day of September, 1945, between Maurice Lipton and Carl F. Olson, which contract was approved by the Superior Court on January 23, 1946, in proceeding No. 348956.

In Witness Whereof, I have hereunto set my hand and seal the 23rd day of October, 1950.

SID FLAHERTY,
Attorney in Fact for
Maurice Lipton.

Witness:

[Seal] ERNEST O. MEYER,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires October 4, 1952.

[Endorsed]: Filed June 10, 1955.

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

Second Defense

I.

Defendants allege that they, and each of them, are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of the complaint and upon said grounds deny all of the allegations in said Paragraph V contained.

II.

Denies all of the allegations set forth in Paragraph VI of said complaint, except that defendants admit that defendant Olson signed a written document with plaintiff on or about July 14, 1948, a true copy of which is annexed to the complaint marked

Exhibit "A", which document was filed with and aproved by the Territorial Boxing Commission of Hawaii July 19, 1948, and admits that at said time Olson and Campos were residents of the Territory of Hawaii.

III.

Denies all of the allegations set forth in Paragraph VII of said complaint, except that defendants admit that defendant Olson and plaintiff signed a written document dated July 20, 1949, denoted Exhibit "B" of the complaint, and admits that at that time Olson and plaintiff were then residents of the Territory of Hawaii. Further, that in this connection defendants allege that said written document was never approved by the Territorial Boxing Commission of Hawaii, pursuant to Rule 78 of the Rules and Regulations of the Territorial Boxing Commission of Hawaii regulating boxing contests.

IV.

Defendants, and each of them, deny each and every allegation contained in Paragraph VIII of plaintiff's complaint, except that defendants allege that at the time the said documents were signed, Olson was a boxer; that he now is a boxer of extraordinary ability. In this connection defendants further allege that said document of 1949, Exhibit "B", was signed and was to be valid only upon receipt of approval of the Territorial Boxing Commission of Hawaii, pursuant to Rules 72 and following of the Rules and Regulations of said Box-

ing Commission. Defendants admit that the document of July 20, 1949, recited the language as evidenced by Exhibit "B" of said complaint.

V.

Defendants, and each of them, deny each and every allegation contained in Paragraph IX of plaintiff's complaint, except that defendants admit that the document denoted Exhibit "A" was duly filed with the Territorial Boxing Commission of the Territory of Hawaii; that plaintiff was issued a license as a manager of Boxer Olson in the Territory of Hawaii from on or about July, 1948, until December 31, 1948, and that thereafter said license was renewed annually for the period ending December 31, 1953, by the Territorial Boxing Commission of Hawaii on the representation, in connection with each renewal, that plaintiff had a contract, Exhibit "A", with defendant Olson. In this connection defendants further allege that plaintiff never was licensed as a manager of Olson in the United States of America, nor in any of the 48 states at any time except in the State of Pennsylvania specifically in October 1, 1950.

VI.

Defendants, and each of them, deny each and every allegation contained in Paragraph X of plaintiff's complaint.

VII.

Defendants, and each of them, deny each and every allegation contained in Paragraph XI of

plaintiff's complaint except that the defendant Olson admits that he fought one Dave Sands and one Sugar Ray Robinson and that at the end of the year 1950 he had been listed as a possible contender for the Middleweight Championship.

VIII.

Defendants, and each of them, deny all of the allegations set forth in Paragraph XII of said complaint except that the documents therein referred to were signed and in this connection defendants allege that the proposed settlement agreement referred to in Paragraph XII was contingent upon the payment of the monies therein required to be paid; that said monies were not paid and that said agreements never became effective or final; that said releases referred to were never intended, nor understood by all of the parties, to fully or otherwise release and extinguish any and all claims on the part of Flaherty in and to the management of said Olson.

IX.

Defendants, and each of them, deny all of the allegations contained in Paragraph XIII of plaintiff's complaint. Further, that in this respect there is nothing due or owing from defendants, or any of them, to plaintiff or otherwise.

X.

Defendants, and each of them, deny all of the allegations set out in Paragraph XIV of said complaint except that defendants admit that defendant

corporation, Sid Flaherty Promotional Enterprises, Inc., was formed on or about June 9, 1954, and that said corporation employs defendants Olson and Flaherty. Defendants further allege that there is nothing due and owing from defendant corporation to plaintiff or otherwise.

XI.

Defendants, and each of them, deny that the plaintiff has been damaged in the sum of \$250,000.00 or any other amount whatsoever by reason of the allegations of plaintiff as set forth in his complaint on file herein, or otherwise.

With Reference to Plaintiff's Further and Separate Count of Cause of Action, defendants and each of them allege as follows:

I.

Defendants refer to their answers to Paragraphs I to XIV inclusive of their answer to the first count, or cause of action of plaintiff, and adopt the same and incorporate each and all of the allegations thereof as part of the defense of this second count, or cause of action, as fully as though set forth at length herein.

II.

Defendants, and each of them, deny each and every allegation contained in Paragraph II of plaintiff's Second Cause of Action.

III.

Defendants, and each of them, deny each and every allegation contained in Paragraph III of

plaintiff's Second Cause of Action and specifically deny that by reason of any of the facts therein alleged, or in said complaint alleged, that plaintiff was damaged in the sum of \$250,000.00 or in any other amount whatsoever or otherwise.

In Answer to Plaintiff's Further and Third Count or Cause of Action, These Defendants Allege as Follows:

I.

Defendants refer to their answers to Paragraphs I to XIV inclusive of their answers to plaintiff's first cause of action and by such reference adopt said answers and incorporate each and all of the allegations set forth therein as and by way of answer of said third count or cause of action, as fully as though set forth at length herein.

II.

Defendants, and each of them, deny all of the allegations in Paragraph II of plaintiff's third cause of action except that the defendant Olson admits that he has engaged in boxing contests and exhibitions since June 27, 1951.

III.

Defendants, and each of them, deny that an actual controversy exists within the jurisdiction of this court between plaintiff and said defendants, or any of them, relating to the legal rights and duties arising out of the said documents, Exhibits "A" and "B" attached to said complaint.

And By Way of Further, Separate and Affirmative Defenses, These Defendants, and Each of Them, Allege as Follows:

Affirmative Defense I

Accord and Satisfaction

After the signing of the document dated July 20, 1949, and the alleged breach thereof alleged in the complaint and before this action, on or about the 30th day of September, 1952, defendants delivered to plaintiff and plaintiff accepted and received from defendants, Sid E. Flaherty and Carl E. Olson, in full satisfaction of the damages mentioned in the complaint and of all of the damages of any kind whatsoever sustained by plaintiff by reason of the acts therein alleged, the sum of \$6,627.84.

Affirmative Defense II

Failure of Consideration

That at all times since the 20th day of July, 1949, plaintiff has failed to perform the covenants incumbent upon him and required to be performed by him under the conditions and terms of said alleged agreements, Exhibits "A" and "B" attached to said complaint in that plaintiff failed to procure adequate and remunerative boxing contests or exhibitions, radio, television and stage appearances for defendant Olson; that plaintiff never secured, nor did plaintiff use his best efforts to secure adequate, appropriate and remunerative boxing con-

tests or exhibitions, radio, television and stage appearances for defendant Olson in the United States of America, or otherwise; in that plaintiff did not provide adequate training facilities and sparring partners for Olson; in that plaintiff did not provide adequate time and effort to develop Olson as a champion.

That at no time did Olson prevent plaintiff from performing, under any agreement or alleged agreement, and in this connection defendants allege that plaintiff consented and permitted defendant Olson to leave Hawaii to come to the United States to secure professional boxing engagements and that plaintiff did not undertake on or about June 27, 1951, or otherwise, to secure engagements for Olson as his manager, nor as manager to license himself in the 48 states of the United States, or any of them, so to do. Further, that the plaintiff failed to devote the necessary time and skill to build the defendant Olson into a champion; that the plaintiff did not have the time and skill and knowledge of boxing and related matters to enable him to develop the defendant Olson into a champion boxer.

Affirmative Defense III

Invalidity

The alleged agreement set forth in the complaint marked Exhibit "B" and made a part thereof is illegal and void and contrary to public policy in that it was not filed for approval nor approved by the Territorial Boxing Commission of Hawaii as

required by law and statute governing such contracts in said Territory of Hawaii; that said alleged agreement was not only void and invalid and unenforceable under the laws of the Territory of Hawaii where signed, but is also void and invalid under the laws of the State of California where it is sought to be enforced, in that said alleged agreement was never filed nor approved by the Boxing Commission of the State of California as required by the regulations of said Commission and the laws and statutes in such state made and provided. Further, that said alleged contract is void and unenforceable under the laws of each and every state in the United States and that plaintiff has never been licensed as a manager in any state in the United States except Pennsylvania, and in that said alleged contract has never been approved in any state in the United States, except Pennsylvania.

Affirmative Defense IV.

Licensing

Plaintiff is not entitled to recover under complaint on file herein in the State of California for the reason that plaintiff has never been, and is not now licensed, as a manager to represent the defendant, Carl E. Olson, in the State of California in accordance with the laws of the State of California, and the rules and regulations of the Athletic Commission of the State of California, nor ever been in any state except Pennsylvania.

Affirmative Defense V.

Laches

That plaintiff had notice of all of the facts and all of the acts of the defendants, and each of them, set forth in the complaint, and nevertheless refrained from commencing this action until June 10, 1955, and has thereby been guilty of such laches as should, in equity, bar the plaintiff from maintaining this action in that defendants have incurred expense and changed their position to their detriment and in that the intervention of equities of third parties have occurred and in that as a result of loss of evidence and the inability to secure testimony in a clear and concise manner of individuals because of the prolonged lapse of time.

Affirmative Defense VI.

Release

Prior to the commencement of this action and on or about the 30th day of September, 1952, defendants, Carl E. Olson and Sid E. Flaherty, duly paid, satisfied and discharged the alleged claim of the plaintiff set forth in the complaint herein by payment to plaintiff of the sum of \$6,627.84 in full satisfaction thereof and as and by way of a release of all claims and demands of all kinds which plaintiff may have then have had or asserted against defendants or any of them.

Affirmative Defense VII.

Waiver

Plaintiff has waived the alleged breach of agreement dated July 20, 1949, as set forth in the complaint in that plaintiff authorized and permitted defendant, Carl Olson, to leave the Territory of Hawaii and to go to the United States—there to fight whom and under whose management he might desire.

Affirmative Defense VIII.

Rescission

On or about June 27, 1951, after making of the alleged agreements dated July 20, 1948, and July 20, 1949, marked Exhibits “A” and “B” respectively and attached to said complaint and before any alleged breach of either or both thereof by defendant Olson, as alleged in said complaint, it was agreed by and between plaintiff and defendant Carl “Bobo” Olson, that the said contracts should be rescinded and they then rescinded the same accordingly.

Affirmative Defense IX.

Abandonment

That on or about May, 1951, plaintiff abandoned the alleged agreements referred to in his complaint dated July 20, 1948, and July 20, 1949, by refusing to perform any of his obligations further required under either or both thereof, and that by reason thereof defendant Carl E. Olson was released from any obligations thereunder.

Affirmative Defense X.

Repudiation

That on or about June 20, 1951, plaintiff repudiated the alleged agreement dated July 20, 1949, marked Exhibit "B" and the memorandum of agreement marked Exhibit "A" attached to said complaint, by advising defendant Olson that he could go anywhere he wanted to make a living; that he could fight anyone whom he pleased and that he could be managed by anyone he desired and that he was through with him; that by reason thereof the defendant, Carl E. Olson, was released from any obligations under either of said alleged agreements, Exhibits "A" and "B" attached to said complaint.

Affirmative Defense XI.

Denial of Performance of Conditions Precedent

Defendants, and each of them, deny that the plaintiff has rendered or offered to render to the defendant, Carl E. Olson, or any of them, the services required to be performed by plaintiff pursuant to the terms and conditions of the alleged agreements, Exhibits "A" and "B" in said complaint, in that plaintiff failed to secure proper and remunerative boxing contests and/or exhibitions for defendant Olson so as to provide a proper and adequate living for defendant Olson.

Affirmative Defense XII.

Unenforceability

Defendants further allege that said alleged agreement, Exhibit "B", is unenforceable by reason of the provisions of Rule 99 of the Boxing Commission of the Territory of Hawaii, which provides that managers may not sign boxers to contracts for a period exceeding three years, without permission of the Boxing Commission of the Territory of Hawaii and in this respect it is alleged that no permission was ever asked for by plaintiff or given by said Commission, respecting said document Exhibit "B" and further, that said document denoted Exhibit "B" was never filed with or approved by the Athletic Commission of the State of California.

Affirmative Defense XIII.

Inequitable, Unjust Enrichment

That said Exhibit "B" is inequitable and should not be enforced in a court of equity in that it is harsh and oppressive, unjust, inequitable and void in that plaintiff seeks to enforce a document which would secure for plaintiff substantial sums of money without rendering or having rendered to defendants, or any of them, any performance or consideration therefor whatsoever.

Affirmative Defense XIV.

Novation

That on or about July 20, 1949, plaintiff and defendant Olson entered into an alleged agreement,

copy of which is attached to plaintiff's complaint as Exhibit "B". That at the time of the execution of said alleged agreement plaintiff and defendant intended to, and did cancel and rescind said Exhibit "B" attached to plaintiff's complaint.

Affirmative Defense XV.

Estoppel

That the plaintiff herein ought not to be admitted to say that defendant Olson repudiated and/or breached any alleged agreements, Exhibits "A" and "B" attached to the complaint in that in June of 1951, plaintiff on several occasions and specifically before the members and/or officials of the Boxing Commission of the Territory of Hawaii, informed defendant Olson that the plaintiff had no desire to stand in the way of permitting Olson to earn a living; that Olson might leave Hawaii and go to California or anywhere he wanted; that he could fight under any manager he desired; that all plaintiff wanted was what defendant Olson then owed him; that in reliance thereon defendant Olson came to the United States, entered into contractual relations in California for a manager, to wit, the defendant, Sid E. Flaherty, wherein Olson agreed to fight for Flaherty and was to receive 100 per cent of any purse of \$1,000.00 or less and $\frac{2}{3}$ s of each purse over \$1,000.00 and Flaherty $\frac{1}{3}$ thereof; that from and after, on or about July 1, 1951, defendant Olson has been so operating under the management of defendant Sid Flaherty, in accord with

memorandum of agreement on file with, and approved by, the Athletic Commission of the State of California, a copy of which is attached hereto marked "Exhibit 1" and made a part of this defense by reference thereto; and further in that defendants have, and each of them have, changed their position to their individual detriment and have incurred and expended large sums of money for equipment, sparring partners, training quarters and other expenditures necessary in maintaining defendant Olson as World Middleweight Champion.

Wherefore, defendants pray that plaintiff's complaint be dismissed and that plaintiff take nothing by his causes of action set forth in said complaint, and that defendants be hence dismissed with their costs incurred and for such other and further relief as is meet in the premises.

/s/ HOWARD E. ELLIS,
Attorney for Defendants,
BERNARD B. GLICKFELD,
Of Counsel.

Affidavit of mail attached.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER

As and for a Supplemental Answer, Defendants
Allege as Follows by Way of a Separate and
Distinct Defense:

Affirmative Defense XVI.

Plaintiff's second cause of action does not state a cause of action in that it is violative of the Statute of Limitations, and is barred by Section 339(1) of the California Code of Civil Procedure, and Section 340(3) of the California Code of Civil Procedure.

Wherefore, defendants pray that plaintiff's complaint be dismissed and that plaintiff take nothing by his second cause of action set forth in said complaint, and that defendants be hence dismissed with their costs incurred and for such other and further relief as is meet in the premises.

/s/ HOWARD C. ELLIS,

Attorney for Defendants,

BERNARD B. GLICKFELD,

Of Counsel.

Attorney for Defendants. Bernard B. Glickfeld,
of Counsel.

Affidavit of mail attached.

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Cases in which claimants or unknown relatives appear, after long silence, to claim some of the fruits of another's labors or property, are not unfamiliar to American courts. This is such a case.

Plaintiff, Campos, a man wholly inexperienced in prize fight management, in Hawaii, in 1948 and again in 1949, contracted to manage the defendant Olson, a prize fighter, for a specified number of years in return for one-third of his gross earnings. Plaintiff's obligation under each contract was to use his best efforts to secure remunerative contests for Olson. The latter, in turn, agreed to fight exclusively for plaintiff.

Plaintiff now seeks damages in this diversity cause from Olson for alleged breach of contract and from the defendants Flaherty and his Enterprises for wrongfully inducing the alleged breach.

Defendants have asserted numerous special defenses tendering questions respecting the validity of the contracts, the bar of the Statute of Limitations, and failure of consideration. But, it is unnecessary to reach and consider these questions. For, assuming both¹ contract to have been valid and sub-

¹There is little doubt that the 1949 contract never became operative because it was never approved by the Hawaiian Boxing Commission.

sisting, the evidence showed that the defendant Olson did not breach either contract.

By June of 1951, the relationship between Campos and Olson had soured; neither had made any money and Olson owed Campos a substantial sum of money which had been advanced to him.

At an informal meeting of the Hawaiian Boxing Commission on June 19, 1951, plaintiff gave Olson permission to go to the Mainland and engage in such boxing matches there as Olson might be able to obtain, in order that he might make a living. This was a clear waiver of plaintiff's contractual right to the exclusive services of Olson, and obviously was intended as such. Consequently, Olson did not breach his contracts with plaintiff by immediately going to the Mainland and engaging in boxing matches there under the management of defendant Flaherty.² No claim is made that Olson thereafter breached the contracts by failing to perform when required by plaintiff, since plaintiff did not obtain any further matches for him, or even contact him to consider any possible matches.

Alternatively to his claim for damages for breach of contract, plaintiff seeks recovery, under the con-

²Olson's letter of June 13, 1951, to the Hawaiian Boxing Commission stating that he would not be available for further matches in the Territory until further notice did not constitute an anticipatory breach of the contracts with plaintiff. The letter was not an unequivocal refusal to perform the contracts, and it was not directed to plaintiff, nor, insofar as the evidence shows, was it even brought to his attention.

tracts, of a share of the proceeds from Olson's fights under Flaherty's management, and a declaration that he is entitled to share in the proceeds of any future fights until the expiration of the term of the 1949 contract. There is no basis for such relief. It is true that when plaintiff waived his right to the exclusive services of Olson at the Commission meeting on June 19, 1951, no specific understanding was reached as to whether plaintiff was entitled to share in the proceeds of the matches which Olson might obtain on the Mainland. But, Olson was certainly justified in assuming from what was said at the meeting, that plaintiff did not expect to share in the proceeds of the Mainland matches except to be repaid advances previously made to Olson.³ Regardless of what plaintiff may have intended at the time of the meeting, what he said there, combined with his failure to make any demand upon Olson for any share in the Mainland purses until September, 1953,⁴ constituted a waiver of any contractual rights he might have had to a manager's share of the proceeds of the fights which Olson engaged in on the Mainland under Flaherty's management. In fact, the acts and conduct of both Campos and Olson indisputably point to the con-

³In 1952, plaintiff recovered a judgment against Olson for these advances in an action in the Superior Court of California, and this judgment was paid.

⁴The long silence, until there had been a substantial period of financial success on Olson's part, is the typical earmark of this kind of litigation.

clusion that the contracts were intended to be and were mutually abandoned in 1951.

In this view, a fortiori, the cause also fails as against Flaherty and his Enterprises.

Judgment will enter in favor of defendants upon findings presented pursuant to the Rules.

Dated: April 20, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 12th, 13th and 14th days of December, 1955, before the Court sitting without a jury, no jury having been demanded, Webster V. Clark, Lawrence W. Jordan, Jr., and Ernest O. Meyer, appearing for the plaintiff, and Howard C. Ellis and Bernard B. Glickfeld, appearing for the defendants Carl E. Olson, Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a corporation, and evidence, both oral and documentary having been introduced, and the cause having been submitted for decision, the Court now makes Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

I.

That the plaintiff, Herbert Campos was at the time of the filing of the complaint herein a resident of the City and County of Honolulu, Territory of Hawaii, and a citizen of the Territory of Hawaii.

II.

That the defendant Carl E. Olson was at the time of the filing of the complaint herein, a resident and citizen of the State of California, being a resident of the County of San Mateo, and the defendant Sid E. Flaherty, was at the time of the filing of the complaint herein, a resident of the City and County of San Francisco, State of California, and a citizen of the State of California.

III.

That the defendant Sid Flaherty Promotional Enterprises was at the time of the filing of the complaint herein and had been continuously since its organization on or about June 9, 1954, a corporation organized and existing under and by virtue of the laws of the State of California and a citizen of said state, with its principal office and place of business in the City and County of San Francisco, State of California.

IV.

That this is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

V.

That on or about July 14, 1948, Carl E. Olson entered into a written agreement with Herbert Campos, a true copy of which is annexed to Plaintiff's Complaint and marked Exhibit "A". That said agreement was made and entered into and delivered by said Carl E. Olson and Herbert Campos in the City and County of Honolulu, Territory of Hawaii, and both Olson and Campos were then residents of said Territory. That said Contract, Exhibit "A", was filed by Herbert Campos with the Territorial Boxing Commission of Hawaii and approved by said Commission on July 19, 1948.

VI.

That on or about July 20, 1949, Carl E. Olson and Herbert Campos signed a written document, dated July 20, 1949, denoted Exhibit "B" in Plaintiff's Complaint; that at that time Carl E. Olson and Herbert Campos were then residents of the Territory of Hawaii. That a copy of said document was filed with the Territorial Boxing Commission of Hawaii, but it was never approved by the Commission.

VII.

That prior to entering into said contract of July 14, 1948, Exhibit "A" to the complaint herein, Campos who wholly inexperienced in boxing management. That neither Olson or Campos received any substantial financial returns from Olson's boxing matches under Campos' management. Commencing in February, 1951, and to and including

the meeting with the Territorial Boxing Commission on June 19, 1951, Olson complained from time to time to Campos and the Commission concerning the scarcity or lack of suitable matches in Hawaii. At said time, to wit, during the spring of 1951, Olson owed Campos sums of money which had been advanced to Olson by Campos throughout the years since June, 1948. Such advances were in addition to Olson's earnings from his boxing performances. That on September 30, 1952, Campos recovered a stipulated judgment against Olson for \$6,627.84 of these advances in an action in the Superior Court of the State of California in and for the City and County of San Francisco, and said judgment was thereafter paid.

VIII.

Carl Olson's letter of June 13, 1951, to the Territory of Hawaii Boxing Commission stating that he would not be available for further matches in the Territory until further notice did not constitute an anticipatory breach of any contracts with Campos. This letter was not an unequivocal refusal to perform the contracts; it was not directed to Campos; nor was it brought to his attention.

IX.

That at an informal meeting of the Territorial Boxing Commission of Hawaii in June 19, 1951, Campos gave Olson permission to go to the Mainland (the United States) to engage in such boxing matches there as Olson might obtain, in order that Olson might make a living. That said permission

constituted a waiver of Campos' contractual right to the exclusive services of Olson and was intended as such.

X.

Carl Olson did not breach his agreements with Campos by immediately going to the Mainland and engaging in boxing matches under the management of Flaherty.

XI.

Campos did not, after June, 1951, ever request Carl Olson to perform in any boxing match, nor did Campos ever obtain any boxing matches for Olson after that time; nor did Campos contact Olson to consider any possible matches after that time.

XII.

That the conduct of Herbert Campos at the June 19, 1951, meeting of Territorial Boxing Commission of Hawaii justified Olson in assuming that Campos did not expect to share in the proceeds of the Mainland matches except to be repaid advances made to Olson.

XIII.

That plaintiff's conduct, by statement and action at the June 19, 1951, meeting, together with Campos' failure to make any demand upon Olson for any share in Mainland purses until September, 1953, after a substantial period of financial success on Olson's part, constituted a waiver of any contractual rights which Campos might have had to a manager's share of the proceeds of fights which

Olson engaged in on the Mainland under Flaherty's management. Campos did not assert to Olson any rights of management after June 19, 1951.

XIV.

The agreements of July 14, 1948, and June 20, 1949, were mutually intended to be, and were abandoned by Herbert Campos and Carl Olson in 1951, and were not breached by Olson.

XV.

Since Carl Olson did not breach any agreements with Herbert Campos and since the agreements of July 14, 1948, and June 20, 1949, were mutually abandoned by Olson and Campos, defendants Sid Flaherty and Sid Flaherty Promotional Enterprises did not cause or induce to be caused a breach of contract between Olson and Campos.

XVI.

That plaintiff was not damaged by defendants; that there is nothing due and owing from defendants to plaintiff.

Conclusions of Law

As Conclusions of Law from the foregoing facts the Court finds:

I.

That the plaintiff Herbert Campos is not entitled to any judgment against any of the defendants in any manner or in any amount.

II.

That defendants, Carl E. Olson, Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a corporation, are entitled to have judgment entered in their favor and against plaintiff Herbert Campos.

III.

That plaintiff Herbert Campos is not entitled to share in the proceeds of any past or future fights of defendant Carl E. Olson, nor is plaintiff Herbert Campos entitled to any accounting for any proceeds of any fights of Carl E. Olson under the contracts dated July 14, 1948, and June 30, 1949, or otherwise.

IV.

That defendants recover their costs of suit.

Judgment is hereby ordered to be entered accordingly.

Dated: May 7, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed May 7, 1956.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 34693

HERBERT CAMPOS,

Plaintiff,

vs.

CARL E. OLSON, Also Known as CARL
"BOBO" OLSON; SID E. FLAHERTY;
SID FLAHERTY PROMOTIONAL EN-
TERPRISES, a Corporation, et al.,

Defendants.

JUDGMENT

The above-entitled cause having been brought on regularly for trial before the Honorable Louis E. Goodman on the 12th, 13th and 14th days of December, 1955, Webster V. Clark, Lawrence W. Jordan, Jr., and Ernest O. Meyer, appearing for the plaintiff and Howard C. Ellis and Bernard B. Glickfeld appearing for the defendants Carl E. Olson, Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a corporation; the Court having heard the testimony and having examined the proof, oral and documentary, offered by the respective parties; and the Court being fully advised in the premises and having filed herein its findings of fact and conclusions of law and having directed that a judgment be entered in accordance therewith,

now, therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged, and Decreed that plaintiff Herbert Campos recover nothing from defendants, Carl E. Olson, Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a corporation, and Judgment is hereby entered in favor of defendants, Carl E. Olson, Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a corporation, against plaintiff.

It Is Further Ordered, Adjudged, and Decreed that plaintiff Herbert Campos is not entitled to any proceeds or share of any boxing contests, exhibitions and performances participated in by defendant Carl E. Olson.

It Is Further Ordered, Adjudged and Decreed that defendants recover from plaintiff costs of suit incurred by defendants.

Dated: May 7, 1956.

/s/ LOUIS E. GOODMAN,
U. S. District Court Judge.

Receipt of copy acknowledged.

Lodged April 24, 1956.

[Endorsed]: Filed and entered May 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Herbert Campos, the plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 7, 1956.

Dated: May 28, 1956.

WEBSTER V. CLARK,
LAWRENCE W. JORDAN, JR.,
ROGERS and CLARK,
ERNEST O. MEYER,

By /s/ WEBSTER V. CLARK,
Attorneys for Plaintiff
and Appellant.

[Endorsed]: Filed May 28, 1956.

The United States District Court, Northern
District of California, Southern Division

No. 34693

HERBERT CAMPOS,

Plaintiff,

vs.

CARL E. OLSON, Also Known as CARL
"BOBO" OLSON; SID E. FLAHERTY,
et al.,

Defendants.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

December 12, 13, 14, 1955

Appearances:

For the Plaintiff:

MESSRS. ROGERS and CLARK, by
WEBSTER V. CLARK, ESQ., and
LAWRENCE W. JORDAN, JR., ESQ.,
ERNEST O. MEYER, ESQ.

For the Defendants:

HOWARD C. ELLIS, ESQ., and
BERNARD B. GLICKFELD, ESQ.

* * *

Mr. Clark: Now, may it please your Honor, we will first offer in evidence as Plaintiff's Exhibit 1 a photostatic copy of the file in the County Clerk's Office in San Francisco of a proceeding entitled,

“In the Matter of the Application of Maurice Lipton for approval of contract with Carl E. Olson, No. 348956.”

The Court: Do you have any objection to any of these documents?

Mr. Ellis: No objection to that except as to the matter of relevancy. That is all.

The Court: What is the date of it?

Mr. Clark: Well, the initial paper in this file, may it please your Honor, is a petition for the approval of the Lipton-Olson contract. It was filed on January 22nd, 1946. This file contains the first contract between Lipton and Olson dated September 18th, 1945, the petition for the approval of that, and Judge Murphy's order approving it.

And it then also contains a petition and stipulation to strike that order approving the Lipton contract, which was signed by the order—the order was signed by Judge Murphy on [32*] October 23rd, 1950, and pertains to this settlement. I called your Honor's attention to it when Olson and Campos were on the way to Philadelphia for the Sugar Ray fight.

The Court: That is included in the same proceeding?

Mr. Clark: It's included in the file. I thought the best way to do it is to put the entire clerk's file in.

The Clerk: Plaintiff's Exhibit 1 introduced and filed in evidence.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Whereupon documents relating to Lipton-Olson contract were received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Ellis: Mr. Clark, that doesn't include the settlement. This is only the litigation?

Mr. Clark: No. It only includes the stipulation entered into by Flaherty as a result of the settlement for the purpose of striking the order.

Mr. Ellis: That doesn't show there in that file. That file was for the purpose of the record, of the court record?

Mr. Clark: Precisely. It is purely the court record.

Mr. Ellis, will you give me the stipulation—or may I ask Mr. Ellis through your Honor to give me the stipulation that between February 3rd, 1947, and April 7th of 1948, which date I take from the Ring record, Olson was under the management of a man named Charles Miller?

Mr. Ellis: What was the year on that? [33]

Mr. Clark: Well, the stipulation I am asking for is from February 3rd, 1947, being the date of the first Miller contract and the Flashy Sebastian fight on April 7th, 1948. Olson was under the management of Miller.

Mr. Ellis: I will give you that stipulation subject to the objection as to relevancy.

Mr. Clark: Very well. We will next offer in evidence, may it please your Honor, as Plaintiff's Exhibit 2, a photostatic copy of the agreement of July 14th, 1948, between Herbert Campos of the

City and County of Honolulu, the Territory of Hawaii, and Carl E. Olson, ring named Carl Bobo Olson, which document shows that it was filed with the Territorial Boxing Commission on July 16th, 1948, and approved by the Commission on July 19th, 1948.

Of course, it is signed by Herbert Campos and Carl E. Olson and notarized before one Henry K. Wong.

Now I might say to your Honor that the original of this document is authenticated on the deposition of Bobby Lee, the secretary of the Territorial Boxing Commission. And there was a stipulation in Honolulu between Mr. Ellis and myself that the photostat could be used. So we have authenticated the original and for the use of the Court I will offer the photostatic copy as Plaintiff's Exhibit 2.

The Clerk: Plaintiff's Exhibit 2 introduced and filed into evidence. [34]

(Whereupon, agreement between Campos and Olson dated 7/14/48 was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Clark: Now I find, may it please your Honor, that the reporter in Honolulu instead of returning the photostat to me sent the original record of the Territorial Boxing Commission showing the licensing of Mr. Campos by the Commission for the years 1946 to 1954. I will offer it in evidence as Plaintiff's Exhibit 3.

Mr. Ellis: No objection.

The Clerk: Plaintiff's Exhibit 3 introduced and filed into evidence.

(Whereupon, Campos license for 1946 to 1954 was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Clark: As Plaintiff's Exhibit 4 we offer an original document dated July 14th, 1948, between Herbert Campos and Carl E. Olson for the term of five years beginning July 19, 1948, until July, 1953, being the so-called worldwide managerial contract which was entered into by Mr. Campos and Mr. Olson on July 14th, 1948.

Mr. Ellis: On that matter, your Honor, it is not pleaded and it is objected to for that reason.

Mr. Clark: Well, it is not offered for any purpose of assuming how it came out during the discovery proceedings. [35] To complete the picture, I think that it should go in evidence.

Mr. Ellis: I have no objection to the contract as to the contents of the document, but as to its legal effect.

The Court: Were there two contracts?

Mr. Clark: Yes. On July 14th, 1948, there were two contracts. Plaintiff's Exhibit 2 is on the Commission form, a form finished by the Territorial Boxing Commission and filed with it and approved by it. And at the same time Campos and Olson signed the agreement which is now marked Plaintiff's Exhibit 4, your Honor.

The Court: Is Plaintiff's Exhibit 4 the Exhibit 8 of the complaint?

Mr. Clark: No, it is not. Exhibit 2 is Exhibit 8 of the complaint, the one we are suing on, the Commission form. But this was also entered into.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 4 introduced and filed in evidence.

(Whereupon, agreement between Campos and Olson, dated 7/14/48, was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Clark: Now I will next offer in evidence, may it please your Honor, the Ring record, the official Ring record of the defendant Carl Bobo Olson as published by Nat [36] Fleischer's Ring Record Book, commencing with his first fight, that is, his officially recognized fight on November 23rd, 1945, up to August 26th, 1955, being the Giambra fight. The only one we don't have is the one, the other fight, the Sugar Ray Robinson fight.

The Court: Any objection?

Mr. Ellis: No objection.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(Whereupon, official Ring record of Olson was received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Clark: I will next offer as Plaintiff's Exhibit 6 a letter addressed to Mr. Herbert Campos under date of February 24th, 1955, from Robert M. Lee, Boxing Administrator of the Territorial Boxing Commission, which shows your Honor the checks delivered by the Commission to Mr. Olson

for his share and to Mr. Campos for his share of the purses of all fights in Hawaii under Campos' management.

Now Mr. Ellis and I have examined the checks that are listed on this list; in fact, I think we have photostatic copies of them. I offer this in evidence as plaintiff's exhibit next in order, deleting, however, may it please your Honor, deleting certain handwriting on the side of this letter reading, "Olson's share of car payment", opposite the item of March 16th, 1949, and also "Credited to Olson—loans as per [37] statement you have," pertaining to the item of June 4th, 1949, and further writing reading, "Given to Olson," opposite the date July 21st, 1948. The purpose of this is to show his earnings under Campos' management.

Mr. Ellis: May I see that? No objection.

The Clerk: Plaintiff's Exhibit 6 introduced and filed into evidence.

(Whereupon, letter of 2/24/55, Lee to Campos, was received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Clark: Now, Mr. Ellis, will you step up here with me for a moment, please?

Now may I ask through your Honor if Mr. Ellis will stipulate with me that in addition to the figures shown on the last exhibit, Plaintiff's Exhibit 6, as receipts under Campos' management Olson received as his share of the fights with Dave Sands in Sydney, Australia, on March 20th, 1950, approximately \$2,600 in American money?

Mr. Ellis: Well, as I calculate it, it was \$2,300. Now I don't know whether we need to argue too much about the \$300.

Mr. Clark: Well, you remember Olson said in his deposition it was \$3,000 and we tried to calculate it and it came out to about \$2,600.

Mr. Ellis: I will stipulate that he got in the [38] neighborhood of \$2,400.

Mr. Clark: That is all right, for \$200 I'll take it. And also the further stipulation that his gross share out of the Sugar Ray Robinson fight was \$1,631.44, from which there was deducted a total of \$600 advanced to him by Campos, leaving a net which Olson received of \$1,031.44.

Mr. Ellis: That is correct.

Mr. Clark: Very well, you will give me that stipulation?

Mr. Ellis: Yes.

Mr. Clark: The next offer as Plaintiff's Exhibit No. 7, your Honor, a tabulation of earnings under Mr. Flaherty's management commencing with July 9th, 1951, which is the date of the first fight under the present Flaherty management up to December 15th, 1954.

Now I may point out to your Honor with respect to this exhibit that commencing on August 21st of last year there was a corporation organized which is named as a defendant in this case, the correct name being Sid Flaherty Promotional Enterprises, Inc., and that since August 27th of 1954, the purses shown on this exhibit are not those received from the fights but rather salary from the corporation.

In other words, what I am trying to say is that commencing in August of last year the purses of Olson's fights have been paid over to the corporation. Instead of drawing their two-thirds, one-third share, Mr. Flaherty and Olson received [39] salaries that are calculated on some basis in lesser amounts from the company. So that the last three fights on this exhibit do not show the true purses. I wanted to supplement that and also bring this exhibit up to date when we can.

Mr. Ellis: Is that the same document you have in the state deposition?

Mr. Clark: Yes, precisely. Do you have any further material on it?

Mr. Ellis: No, I have no further material on it. We have no objection to that, as to the contents contained in that document. Of course, we have reservations as to the introduction against the corporation until some time as some case has been made out against the corporation. We will reserve our objections to that point.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 7 introduced and filed in evidence.

(Whereupon, tabulation of earnings, 1951 to 1954, was received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Clark: Well, may I have the stipulation now, Mr. Ellis, that in about August of last year, August of 1954, Mr. Flaherty signed his managerial rights of Olson over to the corporation?

Mr. Ellis: I will stipulate with you that the corporation [40] was formed on June 7th, 1954.

Mr. Clark: Mr. Flaherty testified in the deposition that he resigned his managerial rights to the corporation.

Mr. Ellis: I won't stipulate to any other facts other than what I have said.

Mr. Clark: In addition to that exhibit, your Honor, I would also like to have annexed to it a paper I overlooked which is a report received by me from the State Athletic Commission of California giving the purses from three fights in 1955, an exhibition held in San Jose, the Willie Vaughan fight on March 12th, 1955, and Joey Maxim on April 13th, 1955. These are the total amounts of purses that were made to the corporation.

Mr. Ellis: No objection.

The Clerk: What exhibit?

Mr. Clark: Just annex it to the last exhibit, please.

The Court: Call it 7-A.

The Clerk: Plaintiff's Exhibit 7-A introduced and filed into evidence.

(Whereupon, 1955 fight record of Olson was introduced in evidence and marked Plaintiff's Exhibit No. 7-A.)

Mr. Ellis: Same reserved right with reference to the corporation.

Mr. Clark: We will next offer as Plaintiff's Exhibit 8, [41] your Honor, an original agreement dated July 20th, 1949, between Herbert Campos of

the City and County of Honolulu, Territory of Hawaii, party of the first part, and Carl E. Olson of the City and County of Honolulu, Territory of Hawaii, party of the second part.

The Court: Is this Exhibit B to the complaint?

Mr. Clark: This is Exhibit B to the complaint, notarized by Mr. Henry H. Wong in Honolulu on July 20th, 1949, recorded in the City and County with the Registrar of Conveyances on July 21st, 1949. As your Honor just asked, this is Exhibit B to the complaint.

Mr. Ellis: As to that document, of course, your Honor, that is pleaded in the pleadings and it is denied by us. So we reserve our objections to that document on the basis that it is an invalid document. It is not a contract and we don't admit that.

The Court: You don't deny——

Mr. Ellis: I don't deny it as to the document in question.

The Court: You don't deny that it was executed, signed by the parties?

Mr. Ellis: No.

The Court: Your objection goes to the effect of the document?

Mr. Ellis: That's right. [42]

The Court: Well then, it has to be admitted in order to determine what effect it has.

Mr. Ellis: All right, sir.

Mr. Clark: In other words, the authenticity is conceded, your Honor.

Mr. Ellis: That is conceded, yes.

The Clerk: Plaintiff's Exhibit 8 introduced and filed in evidence.

(Whereupon, agreement between Campos and Olson, dated 7/20/49, was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Clark: Now, the last mentioned contract, your Honor, is for the term of ten years, also the managerial contracts, two-thirds to Olson, one-third to Campos. Mr. Ellis—your Honor, may I also ask through you—will you give me the stipulation, Mr. Ellis, that at or about that document, Plaintiff's Exhibit 8, was signed by Olson, Campos, that a photostatic copy of it was delivered by Mr. Campos to the Territorial Boxing Commission of Hawaii and that the copy is now in their file and has been ever since, and you and I saw it there?

Mr. Ellis: No. I won't give you the stipulation that it was filed immediately after its execution.

Mr. Clark: I didn't say filed, I said delivered.

Mr. Ellis: I will give you this stipulation as to that, [43] though, that in 1954 it was delivered to the Commission.

Mr. Clark: Well, that is not fair enough. I will have to develop that through the witness. Now do you have an extra copy of the photostat of Mr. Flaherty's contract of September 26, 1949?

Mr. Ellis: Yes, I do.

Mr. Clark: As Plaintiff's Exhibit 9, your Honor, we will offer a photostatic copy of a form of agreement dated September 26, 1949, between Sid E. Flaherty, San Francisco, California, and

Carl Elmer Olson of Honolulu, T. H. It appears to have been signed before a notary public on the preceding day, September 25th, 1949, and bears the notary stamp of the State Athletic Commission of California as of September 26, 1949.

Mr. Ellis: No objection.

The Clerk: Plaintiff's Exhibit 9 introduced and filed in evidence.

(Whereupon, agreement between Flaherty and Olson, dated 8/26/49, was received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Clark: We will next offer, may it please your Honor, an original paper consisting of two pages signed Carl Olson, Boxer, Herbert Campos, Manager, Sid E. Flaherty, Manager, and Joseph J. Phillips, Witness, dated October 11th, 1950. This being the settlement agreement I called your Honor's attention to in October of 1950, between Mr. Flaherty and Olson [44] and Campos.

Mr. Ellis: That is the contingent settlement?

Mr. Clark: I will read it to you.

The Court: Whatever it is, the authenticity of the document, it is admitted.

Mr. Ellis: I have no objection to it being admitted.

The Clerk: Plaintiff's Exhibit 10 introduced and filed into evidence.

(Whereupon settlement agreement between Olson, Campos and Flaherty, dated Oct. 11,

1950, was received in evidence and marked Plaintiff's Exhibit No. 10.) [45]

* * *

Now I will next offer, may it please Your Honor, as Plaintiff's [47] Exhibit 10-A and 10-B, specifically, two papers entitled "Release," bearing the signature of Sid Flaherty, and each dated October 23rd, 1950, notarized by Ernest O. Meyer, Notary Public.

The Court: Releases from Flaherty?

Mr. Clark: Flaherty to Olson.

The Clerk: Plaintiff's Exhibits 10-A and 10-B introduced and filed in evidence.

(Whereupon two releases signed by Flaherty, dated 10/23/50, were received in evidence and marked Plaintiff's Exhibits 10-A and 10-B.)

* * *

Mr. Ellis: No objection.

Mr. Clark: May it please Your Honor, we will offer as Exhibit 11 an original paper dated January 19th, 1951, signed Leo Leavitt, promoter, signed Herbert Campos over the legend Herbert Campos, manager of Boxer Carl Bobo Olson, and approved with the signature of Carl E. Olson, and underneath that the legend Carl Olson, Boxer.

This is entitled "Memorandum of agreement between Leo Leavitt, Promoter, and Herbert Campos, Manager of Boxer Carl 'Bobo' Olson."

Now that, may it please Your Honor, is the agreement under which Olson and Campos agreed with

Leavitt for six fights at not more than 40 days apart, and under which Leavitt failed to produce any fights with the result that Campos couldn't clear himself through the Commission for any other fights until about March 12th of that year. This bears the signature of Mr. Olson.

The Clerk: Plaintiff's Exhibit 11 introduced and filed in evidence.

(Whereupon agreement between Leavitt, Campos and Olson, dated 1/19/51, was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Clark: We will next offer as Plaintiff's Exhibit 12 [50] a photostatic copy of the original minutes of the Territorial Boxing Commission for Monday, February 19th, 1951, at 4:30 p.m. at the National Guard Armory, this having been marked Plaintiff's Exhibit 12 on the deposition, I see, Mr. Ellis.

Mr. Ellis: I have no objection to that.

Mr. Clark: Very well.

The Clerk: Plaintiff's Exhibit 12 introduced and filed into evidence.

(Whereupon minutes of 2/19/51, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Clark: Now may I ask Mr. Ellis through Your Honor this. The reporter didn't return to me the photostatic copy of the minutes of February 26. Do you have two of them?

Mr. Ellis: No, I have one of them.

Mr. Clark: Well, may we use yours and have some made? Of course, it is testified to in Lee's deposition, but I didn't get a copy.

Mr. Ellis: I have no objection.

Mr. Clark: As Exhibit 13, Plaintiff's Exhibit 13, Your Honor, we will offer a photostatic copy of the original minutes of a meeting of the Territorial Boxing Commission for Monday, February 26, 1951 at 4:30 p.m. at the National Guard Armory, being, may it please the Court the next regular meeting of the Commission. [51]

I would like to read the only part of these minutes that pertain to this, Your Honor. On the first page opposite the legend Campos-Olson appears the following:

"Mr. Herbert Lee appeared in behalf of Herbert Campos, manager of Carl Olson, in regard to a disagreement between Campos and Olson. He felt that a legitimate and substantial controversy should be established before being submitted for arbitration.

"Commissioner Flint moved that the chairman appoint a member of the Commission to consult with all parties concerned and find out the facts in the case. The motion was seconded.

"Commissioner Stagbar moved to amend the motion to read that the Commission as a whole sit in to hear the case. The amendment was seconded and carried."

Then at the end of those minutes appears this, your Honor:

"Executive session: There being no further busi-

ness, the Commission adjourned to go into executive session to discuss the Campos-Olson situation, with all parties concerned in the case. After the discussion, the Commission advised them to get together and try to straighten out the matter among themselves, which was agreeable to [52] all concerned."

The Clerk: Plaintiff's Exhibit 13 introduced and filed in evidence.

(Whereupon, minutes of 2/26/51, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 13.)

Mr. Clark: We will next offer as Plaintiff's Exhibit 14 a photostatic copy of the original minutes of the Territorial Boxing Commission for a meeting on Monday, March 19th, 1951, at 4:30 p.m. The only significance of this, may it please your Honor, is that this is the meeting at which the Commission received the notification of the cancellation by letter from Campos of the Campos-Olson contract which had bound them up.

(Whereupon, minutes of 3/19/51, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. Clark: As Plaintiff's Exhibit 15, the original minutes of the meeting of the Territorial Boxing Commission on Monday, May 28th, 1955, at 4:30 p.m. in the National Guard Armory. It was at this meeting, may it please your Honor, that the

Commission approved the Chuck Hunter-Carl Olson fight set for June 19th of this year.

The Clerk: Plaintiff's Exhibit 15 introduced and filed into evidence. [53]

(Whereupon, minutes of 5/28/55, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Clark: We will next offer the minutes of a meeting of the Territorial Boxing Commission held on June 12th, 1951, at the National Guard Armory at which a request was made by the promoter of the Chuck Hunter fight, a Mr. Lou Ah Chew, for the continuance, postponement of the fight to July 3rd. It was granted by the Commission.

The Court: Is there any significance or materiality as to that?

Mr. Clark: Yes, your Honor.

The Clerk: Plaintiff's Exhibit 16 introduced and filed in evidence.

(Whereupon, minutes of 6/12/51, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. Clark: We will next offer the minutes of the meeting held on June 18, 1951, of the Territorial Boxing Commission in which the promoter requested the approval of the Commission to cancel the Olson-Hunter fight.

The Court: And it was approved, the cancellation?

Mr. Clark: No, it was continued until the next

day. That places this very important meeting that your Honor was discussing with Mr. Ellis. [54]

The Clerk: Plaintiff's Exhibit 17 introduced and filed into evidence.

(Whereupon, minutes of 6/18/51, Territorial Boxing Commission, were introduced in evidence and marked Plaintiff's Exhibit No. 17.)

Mr. Clark: In other words, may it please your Honor, on June 18th, 1951, the promoter——

The Court: I got that. He cancelled the fight and it was put over until the next day.

Mr. Clark: No. My point is then the Commission deferred action pending a special meeting to be held the next day at which the principals would be brought in.

The Court: All right.

Mr. Clark: You will notice, your Honor, on the meeting of June 18th Mr. Campos isn't listed as being present and on the 19th he is listed.

Now we come to the minutes of the meeting held on June 19th, 1951, by the Territorial Boxing Commission at 12:15 p.m. in the Armory Building, which consisted only, as the appearances would show, that Herbert Campos was there, Carl Olson was there, the promoter was there, Lou Ah Chew, and Mr. Spagnola was there and Mr. Sherman Dowsett was absent as a commissioner.

(Reading): "With the consent of the principals involved in the July 3rd bout, the Commission [55] approved the request of promoter Lou

Ah Chew to cancel the July 3rd show (Carl Olson versus Chuck Hunter).''

Now it is the recollection of some of the witnesses, may it please your Honor, that it was immediately after this meeting at which the Chuck Hunter fight was cancelled that then and in an informal discussion these things happened which I think is pivotal in the case.

The Clerk: Plaintiff's Exhibit 18 introduced and filed into evidence.

(Whereupon, minutes of 6/19/51, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 18.)

Mr. Ellis: Mr. Clark, the testimony was that that was an executive meeting following that.

Mr. Clark: Well, they said it was an executive session but no minutes were kept of it. That was the testimony, yes. But it was after some meeting along at that time and they called it an executive session. I think everybody agrees on that.

Mr. Ellis: That is right.

Mr. Clark: Now, Mr. Ellis, will you give me the stipulation that pursuant to our joint examination of the minute books of the Territorial Boxing Commission that from February 19th, I think is the date of that first meeting [56] relating to the February meeting which is in evidence, up through this June 19th meeting, which has just been marked, that there were no other minutes which in any way pertain to Campos and Olson or no other references in the minutes which in any way pertain to it.

The Court: Well, if there are any significant ones and your opponent wants to put it in——

Mr. Ellis: Do you mean with reference to the complaints regarding Olson's manager?

Mr. Clark: Precisely.

Mr. Ellis: I am not so sure. Maybe Campos hasn't mentioned——

Mr. Clark: Very well, I withdraw it, your Honor.

The next offer, may it please your Honor, an original letter dated June 27th, 1951, addressed to the Territorial Boxing Commission, Honolulu, T. H., and signed Herbert Campos, which is an exhibit in one of the depositions.

The Clerk: Plaintiff's Exhibit 19 introduced and filed into evidence.

(Whereupon, letter of 6/27/51, Campos to Territorial Boxing Commission, was received in evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Clark: Now the evidence will show that Olson left some time between the meeting of June 19th, 1951, and the date of that letter and came to San Francisco and went into [57] training under Flaherty.

We will next offer as plaintiff's exhibit next in order an original letter dated July 9th, 1951, on the letterhead of Territory of Hawaii, Territorial Boxing Commission, addressed to Mr. Herbert Campos, 1368 Mokulua Drive, Lanikai, Oahu, T. H., and

signed Robert M. Lee, Acting Boxing Administrator.

Mr. Ellis: I want to interpose an objection as to certain portions of the letter as being self-serving on the part of Mr. Campos, and they are not proper evidence in this case. Some parts of it I have no objection to at all.

Mr. Clark: May it please your Honor, I think it is entirely relevant considering the dispute there will be about what happened at the June 19th meeting. And here is a statement by this man within a few days after it again summarizing his position as to Olson. I think it is part of the general background. It is certainly admissible to test the credibility of what these various people will say happened at that meeting. There Campos memorializes his position in writing.

The Court: Well, I think it is a question of weight rather than admissibility. It would have to be evaluated in connection with the testimony.

Mr. Clark: Yes, your Honor.

The Court: Admitted.

(Whereupon, letter of 7/9/51, Territorial [58] Boxing Commission to Campos, was received in evidence and marked Plaintiff's Exhibit No. 20.)

The Court: That is a reply of the Commission?

Mr. Clark: A reply of the Commission to this last letter. I will read it.

“Mr. Herbert Campos,

“1368 Mokulua Drive,

“Lanikai, Oahu, T. H.

“Dear Mr. Campos:

“In reply to your letter of June 27th the Territorial Boxing Commission wishes to state that it has no jurisdiction in the matter of collecting your manager's share of Carl Olson's purse while he is away on the Mainland. The Commission feels that the best procedure to follow would be to write to the California State Athletic Commission, informing them of your rights as Olson's manager and send them copies of your contracts with Olson, advising them that these contracts have been recognized by the National Boxing Association.

“You can request them to withhold one-third of Olson's purse for you, or you may have an injunction filed with the California Commission.

“Yours very truly,

“Robert M. Lee,

“Acting Boxing Commissioner.” [59]

Mr. Ellis: Same objection to that document as to the preceding one.

The Court: The Exhibit 18 shows that Lee was present at that meetnig?

Mr. Clark: Yes, your Honor. He was his secretary, administrator.

The Court: Well, I think it might have some bearing upon the proceedings of that day.

Mr. Ellis: I am only preserving the record in connection with that.

The Court: All right.

Mr. Clark: We will next offer as Plaintiff's Exhibit 21 the confirmation copy of a Mackay Radio addressed to the California State Athletic Commission at San Francisco, California, Herbert Campos, Manager of Olson, 1368 Mokulua Drive, Lanikai, dated July 6th, 1951, reading as follows:

"Gentlemen:

"Informing you that I am recognized as legal manager of Carl Olson by N.B.A. and T.B.C. and am asking that if Olson fights in your state without my consent that you withhold my share of purse, and also action will be taken for his suspension.

"Herbert Campos, Manager of Olson,
"1368 Mokulua Drive, Lanikai." [60]

Does your Honor wish to take the recess now?

The Court: I think we might. Do you have some more documents?

Mr. Clark: There are a few more.

The Clerk: Plaintiff's Exhibit 21 introduced and filed in evidence.

(Whereupon, Mackay radiogram, dated 7/6/51, Campos to State Athletic Commission, was received in evidence and marked Plaintiff's Exhibit No. 21.) [61]

* * *

Mr. Clark: * * * Now also may I ask Mr. Ellis

for a stipulation that the defendant Olson was born on July 11, 1928?

Mr. Ellis: So stipulated.

Mr. Clark: Very well.

We will next offer in evidence, your Honor, a letter bearing the receipt stamp of the Territorial Boxing Commission under date of October 8, 1951, on the letterhead of L. W. Campos Dairies, Kailua, Hawaii, and dated October 8, 1951, addressed to the Territorial Boxing Commission, Honolulu, Oahu, Hawaii, by Herbert Campos under which is the legend "Manager of Carl 'Bobo' Olson". And this is one of the exhibits on deposition, your Honor.

The Clerk: Plaintiff's Exhibit 22 introduced and filed into evidence.

(Whereupon, letter of 10/8/51, Campos to Territorial Boxing Commission, was received in evidence and marked Plaintiff's Exhibit No. 22.)

Mr. Clark: This letter reads as follows: [63]

"Territorial Boxing Commission,

"Honolulu, Oahu, Hawaii.

"Dear Sirs:

"I hereby request that the Territorial Boxing Commission take action on having Carl 'Bobo' Olson suspended from fighting on any part of the Mainland, as I believe as I am recognized as his legal manager by the Territorial Boxing Commission and the N.B.A.

"Thanking you kindly for your cooperation."

Signed

“Herbert Campos, Manager of Carl Bobo Olson.”

We will next offer, may it please your Honor, as Plaintiff's Exhibit 23 a photostatic copy of the original minutes of the Territorial Boxing Commission of a meeting held on Monday, October 8, 1951, at the Honolulu Armory.

The Clerk: Plaintiff's Exhibit 23 introduced and filed into evidence.

(Whereupon, minutes of 10/8/51, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 23.)

Mr. Clark: The pertinent portion of these minutes, may it please your Honor, reads as follows:

Opposite the legend Herbert Campos:

“Herbert Campos, Manager for Carl Olson, presented a letter to the Commission, requesting that Carl Olson be suspended from further participation in [64] boxing on the Mainland. Mr. Campos was informed that inasmuch as he had given permission to Olson to box on the Mainland, the Commission could not suspend Olson. The matter of collecting his manager's share of Olson's purses was a civil one and should be taken up in civil court.” [65]

* * *

Mr. Clark: We will next offer, may it please your Honor, a photostatic copy of the file in an **action pending** in the Superior Court of the State of California, in and for the City and County of

San Francisco, being No. 431374. Embraced in this file is the complaint in the action which, by the way, is entitled "Herbert Campos, versus Carl E. Olson, also known as Carl Bobo Olson; Sid E. Flaherty; First Doe, Second Doe and Third Doe," and embraced in this file are the complaint and exhibits to it, the answer to complaint and cross-complaint, first amended answer to complaint and cross-complaint, and the answer to the cross-complaint, this being the state action which was brought on the Campos July 20, 1949, contract.

Mr. Ellis: The counsel in that case?

Mr. Clark: Oh, the counsel in the case are Frederick L. Hewitt, 68 Post Street, San Francisco, for the palintiff Campos; and I think it was Mr. Ehrlich and Mr. Lahanier——

Mr. Ellis: For the defendants.

Mr. Clark: Yes. Just a minute here. W. A. Lahanier and J. W. Ehrlich for the defendants Olson and Flaherty.

Mr. Ellis: No objection.

The Court: Now, what is this about? What became of [69] that action?

Mr. Clark: That action is still pending, your Honor.

The Court: Nothing has been done about it?

Mr. Clark: Well, it is at issue and under stipulation——

The Court: That was filed in what year?

Mr. Clark: That was filed, may it please your Honor, the complaint was filed on September 11, 1953. It is at issue.

The Court: What do I want with that here?

Mr. Clark: Well, it has certain relevance to this case, may it please your Honor. It is an action based on one of the contracts sued on here.

The Court: Yes, for damages?

Mr. Clark: For damages, and an accounting. By stipulation between Mr. Ellis and myself, who are now counsel for the respective parties, this action is to await the decision on the merits in the present action before your Honor. And of course, such part of this as would be *res adjudicata* disposes of the state action.

Now, the relevancy of it is that, No. 1——

The Court: If you lose out here on the statute of limitations you can go back to the other one?

Mr. Clark: That's one possibility, but it has a more important bearing, your Honor, on the defense of laches. I mean, it shows that Campos as early as September, 1953, had [70] brought suit on his contract. It also has some relevancy on the further point we raised in defense of this case, aside from laches.

The Court: All right.

The Clerk: Plaintiff's Exhibit No. 25 introduced and filed into evidence.

(Whereupon, file, Superior Court action No. 431374, was received in evidence and marked Plaintiff's Exhibit No. 25.)

Mr. Clark: May I have the deposition of Mr. Bobby Lee opened, Mr. Lee being the secretary and

administrator of the Territorial Boxing Commission.

The Clerk: You want the exhibits?

Mr. Clark: I want the exhibits, that is what I want.

Mr. Ellis: As a matter of procedure, your Honor, would it be advisable for us to read the portions of these depositions that we want in following plaintiff, or would you prefer that they be brought in at the subsequent time?

Mr. Clark: I am not going to read from it now, I just want one exhibit.

We will next offer as plaintiff's exhibit next in order, may it please your Honor, the Rules and Regulations of the Territorial Boxing Commission of Hawaii, which is annexed in book form to Mr. Lee's deposition as Exhibit 2-A thereon. I will ask that the booklet be marked Plaintiff's Exhibit [71] 26-A and as 26-B we will offer a mimeographed document containing the amendments to the rules up to date.

Mr. Ellis: No objection.

The Court: All right, mark them.

The Clerk: Plaintiff's Exhibit 26-A and 26-B introduced and filed into evidence.

(Whereupon, Rules and Regulations of Territorial Boxing Commission were received in evidence and marked Plaintiff's Exhibit 26-A; Amendments to Rules marked Plaintiff's Exhibit 26-B.) [72]

HERBERT VINCENT CAMPOS

the plaintiff herein, called as a witness in his own behalf, sworn.

The Clerk: Will you please state your name to the Court, sir?

The Witness: Herbert Vincent Campos.

Direct Examination

By Mr. Clark:

Q. Your name is Herbert Vincent Campos?

A. Yes, sir.

Q. Where do you live, please, Mr. Campos?

A. 1368 Mokulua Drive, in Lanikai.

Q. Is that Hawaii? A. Honolulu, T. H.

Q. That's on the Island of Oahu where Honolulu is, is that right? A. That's right.

Q. What is your business at this time?

A. Bookkeeper for the L. W. Campos Ranch; assistant office [73] manager.

Q. Office manager for L. W. Campos Ranch?

A. That is right.

Q. Who is the L. W. Campos?

A. That is my brother.

Q. I see. Do you know the defendant in this case, Carl "Bobo" Olson? A. Yes, sir.

Q. When did you first meet Mr. Olson, please?

A. It was in the year 1948, in the latter part of May.

Q. Will you please describe the circumstances to His Honor under which you met Mr. Olson?

A. I was looking over some cows at the ranch

(Testimony of Herbert Vincent Campos.)

there, that is out by the pen, cattle pen, and Olson approached me with Tommy Campos, my nephew.

Q. Tommy Campos, your nephew?

A. That's right.

Q. By approached you, he came up to you, is that right? A. That is right.

Q. All right. Now, what if anything did Olson say to you on that occasion?

A. Well, he introduced himself as Carl "Bobo" Olson, fighter, which I had heard of.

The Court: Counsel, you are asking him pretty general sort of questions, opening a pretty big door. Is there any [74] need for going into that?

Mr. Clark: I am going into the execution of this contract, your Honor, the circumstances under which the first contract sued on, namely, that of July 14, 1948, was entered into. I think that is very important in this case.

The Court: If there is any ambiguity in the contract, yes.

Mr. Clark: No, there is no ambiguity in the contract whatsoever.

The Court: Well, what difference does it make if the contract is already in evidence? That's the contract that they made. Now, why not go on from there? Now, what is it you want to show?

Mr. Clark: I simply want to show the entire background, your Honor, of the relationship between Mr. Campos and Olson, how they came to enter into the contract, the performance by Mr. Campos of that contract, and——

(Testimony of Herbert Vincent Campos.)

The Court: What happened afterwards, yes, but I don't need any atmosphere about this thing. You got a contract, and you start from that point, because the only question here is, was there a breach of the contract.

Mr. Clark: Very well.

The Court: You have already got the contract in evidence, the parties have a contractual relationship. Why don't we go on from there? [75]

Mr. Clark: All right. May I have——

The Court: I am not trying to tell you how to try this case, Mr. Clark. Don't think that for a moment. I am just trying to shorten it, that's all.

Mr. Clark: I have been here before, your Honor, as you well know.

May I have the exhibits, Mr. Evensen?

Q. (By Mr. Clark): Now, Mr. Campos, I want to show you Plaintiff's Exhibit No. 2 in this case, which is an agreement dated July 14, 1948, signed by you and Carl E. Olson. In connection with the signing of that agreement, did you do anything with respect to making arrangements for a trainer for Mr. Olson?

A. Yes, I hired a trainer by the name of Sharkey Wright.

* * *

Q. Who was Sharkey Wright, please?

A. He was one of the best trainers in Honolulu, boxing trainers. [76]

Q. How did you come to employ Sharkey Wright?

(Testimony of Herbert Vincent Campos.)

A. Olson advised me that Sharkey Wright was willing to train him.

Q. Did Olson say anything at that time about Sharkey Wright having formerly trained him?

A. Yes, sir.

Q. All right. What arrangements did you make with Sharkey Wright for training Olson?

A. He was to get one-third of my one-third share.

Q. All right. In other words, your one-third share under this management agreement?

A. That is correct.

Q. Now, during the fall of 1948 Mr. Olson's ring record shows that he had four fights commencing with one with Charley Cato in Honolulu on July 20th and ending on December 14th with John Boski in Honolulu. Did you obtain those fights for him?

A. I believe not.

Q. No, the four fights.

A. The four fights, yes, I did.

Q. You say you believe not. Were there any of them that you did not arrange for?

A. It wasn't the first fight. After July 14, I think it was July 20 that——

Q. All right. Now, the ring record shows that Olson fought [77] Charley Cato on July 20. Are you telling us you did not arrange for that?

A. Yes, sir.

Q. You did not arrange for that fight?

A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Mr. Ellis: Mr. Clark, may I object to leading this witness?

Mr. Clark: Very well.

Mr. Ellis: In other words, asking for his own information, not yours.

Mr. Clark: Very well.

The Court: I don't know whether he agrees with your question or not.

Mr. Clark: All right.

The Court: He wants to know whether the fight was arranged for—the fight was arranged before you came on the scene, is that it?

The Witness: Yes, we signed the contract on the 14th, but the fight had been arranged already.

The Court: All right, go ahead.

Q. (By Mr. Clark): And was fought after the contract? A. Yes, sir.

Q. What if any disposition did you make of your share of that purse?

A. I turned my share over to Carl Olson. [78]

Q. In other words, you turned your manager's share over to Carl Olson? A. Correct.

(Colloquy between counsel, inaudible to the reporter.)

Q. (By Mr. Clark): I will show you, Mr. Campos, the confirmation copy of a telegram addressed to Sid Flaherty under date of November 18, 1948, and signed Herbert Campos. Did you send the original of that telegram to Mr. Flaherty on or about November 18, 1948? A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Mr. Clark: We offer it in evidence, your Honor.

The Clerk: Plaintiff's Exhibit 27 introduced and filed into evidence.

(Whereupon, copy of Mackay radiogram dated 11/18/48, Campos to Flaherty, was received in evidence and marked Plaintiff's Exhibit No. 27.)

Mr. Clark: The telegram reads as follows:

"November 18, 1948.

"Sid Flaherty, Leavenworth Gym, Leavenworth Street, San Francisco, Calif.

"Am thinking of fighting Carl Olson on Mainland near future. Olson recommends you as trainer. Will you accept——"

it is spelled e-x-c-e-p-t. [79]

"Please answer if there are any fights available soon. Answer manager of Carl Olson, care Kairad, Honolulu, Herbert Campos."

Q. Now, how did you come to send that telegram, Mr. Campos?

A. Well, I was thinking of taking, of bringing Olson down to the Mainland and fighting. Olson advised me that Sid Flaherty used to train him in the past and that he wanted Flaherty to train him.

Q. Did you learn from Olson that back in 1945 and 1946 Olson had been up on the Mainland boxing?

Mr. Ellis: Objected to as a leading question.

Mr. Clark: All right, withdraw it.

(Testimony of Herbert Vincent Campos.)

Q. How did you come to be discussing that matter with Olson?

A. Olson told me that Sid Flaherty used to train him here.

Q. I see. And so you wired Flaherty to see if you could get any fights——

The Court: He has already said that.

Mr. Clark: Very well.

Q. Now, I next show you, Mr. Campos, a letter dated November 17, 1948, addressed to you, Kairad, Honolulu, T. H., and signed Sid Flaherty.

Did you receive that letter in the course of post after sending the original telegram you have just testified to? A. Yes, sir. [80]

Mr. Clark: Offer it in evidence, your Honor.

The Clerk: Plaintiff's Exhibit No. 28 introduced and filed into evidence.

(Letter dated November 17, 1948, Sid Flaherty to Herbert Campos, admitted in evidence and marked Plaintiff's Exhibit 28.)

Mr. Clark: This letter reads as follows, may it please the Court:

“November 17, 1948.”

Your Honor will observe there was some mixup in the dates there. The radiogram this refers to is dated November 18th and we only have the confirmation copy so the original may have been dated earlier, or there may be a mistake on the letter. But the letter reads this way:

“Mr. Herbert Campos, Kairad, Honolulu, T. H.

(Testimony of Herbert Vincent Campos.)

“Dear Mr. Campos:

“Just received your wire. Have been in Nevada with some fighters, just returned, hence my being late answering your wire.

“Thanks for considering me. As you know Moe Lipton has a contract on Olson in the States and until said contract is voided in Superior Court or an agreement reached with Moe I would not care to become implicated.

“I will write Moe today and contact you again in [81] the very near future.

“Frankly most of the shows will close down after the next few weeks until after the holidays.”

Q. Now, prior to receiving this letter from Mr. Flaherty in November, 1948, had you ever heard about a contract, a prior contract between Olson and Lipton? A. No, sir.

Q. After receiving this letter from Mr. Flaherty what, if anything, did you do about investigating that matter?

A. I believe I called Tommy Miles, since he was the secretary of the boxing commission at one time, and I knew him pretty well, and I asked him about it and he told me that he knew something about it.

Q. Did he tell you anything about the Lipton arrangement?

A. He told me that Sid Flaherty and Lipton had a contract over Olson.

Mr. Ellis: Just a minute. If he is testifying now as to conversations which he alleged he has had

(Testimony of Herbert Vincent Campos.)

with Tommy Miles, that is hearsay evidence as to my defendants.

Mr. Clark: I don't care about them, your Honor; just wanted to develop the man's investigation of the Lipton matter.

Q. Did you do anything else as far as the Lipton contract was concerned at that time?

A. I went down to the courts, Territorial court there and checked the records there. [82]

The Court: This is also hearsay.

Mr. Clark: Very well.

Q. Did you go to see Mr. Lipton about it?

A. Yes, I went up afterwards to see Mr. Lipton about it.

Q. Where did you see him, please?

A. At his office on Fort Street, there in the building.

Q. Did you have a conversation with Mr. Lipton about his former contract? A. Yes. [83]

* * *

Q. (By Mr. Clark): After receiving this letter, Mr. Campos, were there any further communications with Mr. Flaherty up until, we will say—well, up until October, 1950, about Carl Olson fighting on the Mainland? A. No, sir.

Q. Very well. Now, let me take you, Mr. Campos, up to a date shown by Mr. Olson's ring record, namely, June 3, 1949, on which date he fought Tommy Yarosz in Honolulu. I want you to try to orient yourself and put yourself back as of about

(Testimony of Herbert Vincent Campos.)

that time, June 3rd of 1949. Up to that time you had arranged certain other fights for Olson, had you not? A. Yes, sir.

Q. Up to that time, with the one exception of the Raadik fight, which took place on March 15, 1949, had Olson received his full two-thirds share of all purses earned from the fights you had obtained for him? A. Yes, sir.

Q. By the way, who paid the training expenses and business expenses having to do with your management of Olson? A. I did.

Q. You did? A. I did.

Q. Was that out of your one-third share? [84]

A. Yes, sir.

Q. So then am I correct in stating that up to this time Olson received his full two-thirds share before expenses were taken out?

A. Yes, sir.

Q. All right. Now, also during this time had you advanced any money by way of personal loans to Olson? A. Yes, sir.

Q. Can you give us the approximate amount of those loans up to the time of the Yarosz fight?

A. About \$8,300.

Q. Do you have your cancelled checks evidencing those loans with you here in court?

A. Yes, sir.

Q. What were they for, please; just generally?

A. Well, house——

Mr. Ellis: The checks would be the best evidence.

(Testimony of Herbert Vincent Campos.)

Mr. Clark: I don't want to burden the record.

The Court: Just ask him what they were for generally.

Q. (By Mr. Clark): Yes, generally.

A. Payments for his home, water bills, light bills, golf course dues, maternal cases, car notes.

Q. You mean expenses on the birth of children?

A. That's right.

Q. I see. And car notes? [85]

A. Car notes, telephone bills.

Q. All right. Now, directing your attention—oh, and, by the way, had you as part of those advances made Olson any loan for the down payment on his home?

A. Yes, I made a down payment for his home of \$3,000.

Q. I see. Was that evidenced by evidence of that indebtedness?

A. It was a loan made to him and he signed a note for it.

Q. Very well. You have the note with you, have you?

A. Yes, sir.

Q. Now, directing your attention to the Raadik fight on March 15th, was there any different arrangement about Olson's share of that purse made between you and him?

A. Yes, sir.

Q. What was it, please?

A. Well, he wanted to buy a car and he told me that I could take his share of the purse as a down payment on the car.

(Testimony of Herbert Vincent Campos.)

Q. If you would put up the down payment on the car?

A. Yes. if I would put the down payment on the car.

Q. And did you put up the down payment on a Buick automobile for him? A. Yes, sir.

Q. How much did that amount to ultimately?

A. About \$1,800.

Q. And am I correct in stating that his share of the Raadik [86] purse was around \$1,000?

A. Well, thousand twenty-four dollars.

Q. All right.

The Court: March 15th of what year?

Mr. Clark: March 15, 1949.

Q. Directing your attention to the Yarosz fight on June 3, 1949, was there any arrangement different from that you have testified to made regarding Olson's purse between you and him on that fight?

A. Yes, sir.

Q. Please state what it was.

A. Olson gave me his share of the purse on the Yarosz fight as payment on his personal loans account.

Q. Which I think you have stated came to about \$8,300? A. \$8,300.

Q. Am I correct in stating that the Olson share of the Yarosz purse was about \$1,600?

A. Yes, sir.

Q. Was that credited by you then to the personal advances you had made to Olson?

A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Q. Very well. All that had happened prior to July 20, 1949? A. Yes, sir.

Q. Is that not right? A. Correct. [87]

Q. Then on July 20, 1949, am I correct in stating that you——

Mr. Ellis: Let him testify what happened; don't you give him the words.

Mr. Clark: This is in evidence already and I am simply trying to shorten it.

Mr. Ellis: You are following that practice of leading this witness.

Q. (By Mr. Clark): Let me show you, then, Mr. Campos, Plaintiff's Exhibit 8, which is a contract dated July 20, 1949, between you and Olson for the term of ten years. You entered into that contract about July 20th? A. Yes, sir.

Q. Of 1949? A. That's right.

Q. That was after these financial arrangements between you and Olson whereby you had advanced——

The Court: You don't have to go over it. He has already testified when the financial arrangements were made, so this follows chronologically.

Mr. Clark: Very well.

Q. At the time you and Olson signed the ten-year contract of July 20, 1949, Mr. Campos, did you have any discussion at all concerning any complaints by Olson about his financial situation?

A. No, sir. [88]

Q. Now, after signing this last contract, I call your attention to Olson's ring record which shows

(Testimony of Herbert Vincent Campos.)

that he fought Milo Savage in Honolulu on July 26th, Art Hardy on August 23rd, and by that time in '49 had you made any arrangements with the commission or a promoter for a fight between Olson and Johnny Duke?

A. Yes, sir, we signed a contract to have Olson fight Johnny Duke at Honolulu.

Q. Do you remember the date that fight was to come off?

A. I don't remember very clear, but I think it was to be July—I don't recall the date.

Q. Was it sometime in October?

A. I believe it was October, the latter part.

Q. Very well. You don't remember the date off-hand. Now, did Olson meet Johnny Duke on the date originally contracted for? A. No, sir.

Q. What happened?

A. Olson left for the Mainland without notice.

Q. Well, Olson left for the Mainland?

A. Yes, sir.

Q. Before leaving did he let you know he was going? A. No, sir.

Q. How did you find out he had gone?

A. I was playing golf on the golf course and somebody came over and told me that Olson had left for the Mainland. [89]

Q. Then did you check up?

A. Yes, sir.

Q. What did you then do, if anything, so far as the commission was concerned and the Johnny Duke fight, with no fighter there?

(Testimony of Herbert Vincent Campos.)

A. I went down to see the commission; they told me they couldn't do a thing until the weigh-in time.

Q. Until the weigh-in time?

A. That's right—for the fight, and that he would be suspended by the commission if he did not appear that date.

Q. Now, did you also do anything toward getting in touch with Olson?

A. Yes, Mr. Spagnola came to see me, and he wanted to come up to the Mainland and get Olson, and we went into an agreement whereby he acted as my agent.

Q. Now, who was Spagnola?

Mr. Ellis: Was Mr. Olson present or Mr. Flaherty at any of these conversations he is now relating?

Mr. Clark: Well, I am not concerned with the substance of the conversations; I am asking for the fact that he sent Spagnola to contact Olson.

The Court: Well, just ask him that.

Mr. Clark: What is that, your Honor?

The Court: I say, just ask him that.

Mr. Clark: That is what I have asked him. May I have [90] the last question?

(Record read by the reporter.)

Q. (By Mr. Clark): Who was Spagnola?

A. He was a friend of Carl Olson's.

Q. Had you met him through Olson?

A. Yes, sir.

Q. Then did Spagnola come on up to San

(Testimony of Herbert Vincent Campos.)

Francisco? A. Yes, sir.

Q. What was the result of that, Mr. Campos, of Spagnola coming to San Francisco?

A. Well, he got Olson, and then he continued on to New York with Olson.

Q. Was that pursuant to your instructions?

A. Yes, sir.

Q. I see. What was the purpose of going to New York? A. To get Olson some fights.

Mr. Ellis: That calls for his conclusion——

Mr. Clark: He has testified he instructed him to take Olson to New York, and I am asking the purpose of it.

Mr. Ellis: Isn't there a written agreement between them in regard to this?

Mr. Clark: No, there is not.

Mr. Ellis: A power of attorney?

Mr. Clark: There is an agreement between them so far as Spagnola's ultimate employment of Olson is concerned, but nothing [91] I remember of where they should go.

Q. What was the purpose of you instructing Spagnola to take Olson on to New York?

A. To get some fights there.

Mr. Ellis: Objected to as——

Mr. Clark: To get some fights——

Mr. Ellis: State what he did.

Mr. Clark: All right.

Q. Now, did Olson get any fights in New York?

A. Well, he could have gotten some fights, but

(Testimony of Herbert Vincent Campos.)

since he was suspended by the Territorial Boxing Commission he couldn't go through with it.

Q. Now, meanwhile, and while Spagnola and Olson were in New York, were you still in the islands? A. Yes, sir.

Q. What, if anything, did you do about trying to get his suspension lifted?

A. I hired an attorney, Herbert K. Lee.

The Court: Well, what hapened? Did the suspension get lifted?

The Witness: No, sir.

Q. (By Mr. Clark): In other words, the suspension didn't get lifted so long as they were in New York? A. That's right.

Q. Well, what was the ultimate outcome of the Bobby Duke [92] episode?

A. It was that Olson had to return back to Honolulu and fight Johnny Duke in Honolulu.

The Court: And did he do that?

The Witness: Yes, sir.

The Court: When was that?

The Witness: That was in November, I believe.

Mr. Clark: The ring record shows Olson fought Johnny Duke on November 22nd in Honolulu.

The Court: 1949?

Mr. Clark: 1949.

The Court: All right.

Mr. Clark: Yes, your Honor. November 22, 1949. And it also shows, of course, there were no fights between the Art Hardy fight, August 23rd, until

(Testimony of Herbert Vincent Campos.)

Olson came back and fulfilled his engagement with Johnny Duke on November 22nd.

Q. Now, Mr. Campos, as a result of the Raadik and Yarosz fights in early 1949 was Olson given any rating?

Mr. Ellis: Just a minute. I object to that as——

A. Yes, sir.

Q. (By Mr. Clark): And——

Mr. Ellis: ——as leading. If he knows whether he had a rating, why don't you ask him that now?

Mr. Clark: All right.

Q. Was Olson a rated—— [93]

The Court: I thought you had already put in some documents to show——

Mr. Clark: No, not on the ratings.

The Court: Not on the rating?

Mr. Clark: Not on the rating, your Honor, just the fights.

The Court: Can't you agree on that? I don't want to spend a lot of time here investigating all this prizefighting jargon. That isn't subject to dispute, is it?

Mr. Clark: My information is, your Honor, that Olson was never rated until for the first time in 1949 after the fight with Tommy Yarosz.

The Court: Well, now, what do you mean by "rating"?

Mr. Clark: And that he was then rated seventh——

The Court: Somebody makes a rating, then?

Mr. Clark: Yes, your Honor; a recognized con-

(Testimony of Herbert Vincent Campos.)

tender for the middleweight championship of the world.

The Court: Can't you agree on that?

Mr. Ellis: I am willing to stipulate as follows: That in 1949 he was rated No. 8 by the Ring Magazine. In 1950 he lost that rating and never had any further rating until long after he had ceased to operate with Mr. Campos.

Mr. Clark: I am not prepared to accept the latter part of that stipulation, your Honor. I will ask for a stipulation to this effect: That Olson was rated for the first time by Ring [94] Magazine in 1949, and I'll take the No. 8 rating you have stated.

The Court: Is that correct, Mr. Ellis?

Mr. Ellis: I will stipulate that in November of 1949, he was rated No. 8 in the middleweight, 160-pound, class.

The Court: He wants you to stipulate further that was the first time he had a rating. Is that correct?

Mr. Ellis: I have no records prior to that November issue, so I can't stipulate prior to that.

Mr. Clark: We will develop that from the witness with one question, your Honor.

Q. Prior to November of 1948—was that the date, Mr. Ellis?

Mr. Ellis: November, 1949.

Q. (By Mr. Clark): November, 1949. Prior to November of 1949, Mr. Campos, was Olson rated as a contender for the middleweight championship of the world? A. No, sir.

Q. Very well. You continued to obtain engage-

(Testimony of Herbert Vincent Campos.)

ments for Olson during 1950? A. Yes, sir.

Q. The ring record shows one of those was with Dave Sands in Sydney, Australia?

A. That is correct.

Q. Who was Sands? [95]

A. He was the middleweight champion of the British Empire and the third ranking contender for the middleweight title.

Q. Very well. Then after some other bouts that are shown by Olson's ring record, it further shows that he met Ray Robinson? A. That's right.

Q. Who is the present middleweight champion of the world, in Philadelphia, on October 26th?

A. Yes, sir.

Q. Of 1950? A. That's right.

Q. Is that right? A. Yes.

Q. Now, did you accompany Olson to Philadelphia for the Robinson fight? A. Yes, sir.

Q. On your way to Philadelphia with Olson on that occasion did you stop over in San Francisco?

A. Yes, sir.

Q. Did you see Mr. Flaherty in San Francisco?

A. Yes, sir, I did.

Q. Now, will you please state to his Honor the circumstances under which you met with Mr. Flaherty, who was present, and all the rest of it?

A. Well, I wanted to clear up the contract problem of Sid Flaherty and Carl Olson and Moe Lipton and Carl Olson at the time.

Q. Now, in making that statement, Mr. Campos—

(Testimony of Herbert Vincent Campos.)

The Court: You are referring now to the settlement agreement of October 11, 1950?

Mr. Clark: Yes, your Honor.

The Court: You already have that in evidence, haven't you?

Mr. Clark: No, I don't have all the parts of it; there were some releases, there was——

The Court: Well, you have got Exhibits 10, 10-A and 10-B.

Mr. Clark: I have the releases in evidence and I have the settlement in evidence, that is quite true. Very well, I won't go into it any further.

The Court: I assume that you are going to ask him whether he participated in that?

Mr. Clark: That's right.

The Court: That's right?

The Witness: That is right.

The Court: All right. Go ahead.

Mr. Clark: Yes.

Q. Now, were there negotiations which led to the final settlement price? A. Yes. [97]

Q. Where did that take place, please?

A. The California Athletic Commission.

Q. The California Athletic Commission at their office here in San Francisco? A. Yes, sir.

Q. Who was present during those talks?

A. There was my attorney, Ernest Meyer; Sid Flaherty; Carl Olson, Sharkey Wright; I believe Mr. Phillips of the California Athletic Commission.

Q. Mr. Phillips of the California Athletic Commission? A. I believe so.

(Testimony of Herbert Vincent Campos.)

Q. Did this all take place out in the office of the commission? A. Yes, sir.

Q. Here in San Francisco? A. Yes, sir.

Q. All right. Now, I want to show you the original agreement which has been marked Plaintiff's Exhibit 10 in this case, and I will ask you to remember who prepared that, the circumstances under which it was prepared.

A. This was prepared by the secretary of Mr. Phillips, I believe, of the California Athletic Commission.

Q. You mean she type it?

A. She typed it and he dictated it.

Q. Who dictated it? [98]

A. Mr. Phillips, I believe.

Q. Who is a member of the commission?

A. Yes, sir.

Q. That was after he had sat in on these negotiations, is that right? A. Yes, sir.

Q. Then did you and Olson proceed on to——

A. Philadelphia.

Q. Philadelphia? A. That's right.

Q. And there Olson fought Sugar Ray Robinson and was knocked out in the twelfth round?

A. Correct, yes, sir.

Q. Is that right? A. Yes, sir.

Q. Following the Robinson fight what did you and Olson do?

A. We went back to Honolulu and Olson wanted to rest for a while, so he rested until the following month—I think it was the following year, 1951.

(Testimony of Herbert Vincent Campos.)

Mr. Ellis: May that part of the answer be stricken that is not responsive, that Olson wanted to rest, so he rested? His conclusion.

Mr. Clark: All I am concerned with is the fact that Olson rested until the end of the year after the Robinson fight.

Q. Is that right? [99] A. Yes, sir.

Mr. Ellis: Maybe he rested because there weren't any fights.

The Court: Well, there weren't any fights for the rest of the year. Go ahead.

Mr. Clark: That's right.

Q. Commencing in January, 1951, then what, if anything, did you do, Mr. Campos, about getting further fights for Olson?

The Court: You have already got that in, haven't you, counsel? You have got Exhibit 11, which is the agreement between Leavitt and Campos.

Mr. Clark: Precisely.

The Court: For six fights.

Mr. Clark: That's right.

The Court: That Leavitt didn't get the men, so that was the end of that.

Mr. Clark: Very well.

The Court: You have already got it in; it is in evidence.

Mr. Clark: Very well.

Q. Well, what, if anything, did you do, or did you do anything, Mr. Campos, prior to the expiration of this Leavitt agreement?

(Testimony of Herbert Vincent Campos.)

A. I went——

Q. About trying to get out from under it.

A. I went down to the Territorial Boxing Commission and [100] stated that Leavitt could not produce any fighters for Olson, and I wanted to break up the contract.

Q. Did they tell you anything?

A. They told me to come back at the specified date, which the contract expired.

Q. I see. Then did you do anything toward cancelling that contract?

A. I wrote to the commission——

Q. After the forty days went by?

A. I wrote the commission a letter stating that the contract had terminated.

Q. I see. Now, Mr. Campos, I want to show you the minutes of a meeting of the Territorial Boxing Commission held on February 19th, 1951, in Honolulu, which recites that among other persons you, Herbert Campos, were present, Herbert Lee was there, Carl Olson was there, James Spagnola and Heywood Wright—that is Sharkey Wright, is it?

A. That's right.

Q. In which minutes it is stated that Olson filed a verbal notice of disagreement, and then there was some talk about arbitration. First of all, you were present at that meeting, were you?

A. Yes, sir.

Q. Prior to going to that meeting had you received any complaints at all from Olson about any treatment you were giving [101] him as manager?

(Testimony of Herbert Vincent Campos.)

A. No, sir.

Q. You had not? A. Had not.

Q. How did you happen to be at the meeting?

A. I was informed by the Territorial Boxing Commission I was to appear there.

Q. That you were to appear? A. Yes, sir.

Q. Who is Mr. Lee, whose name I read?

A. He is Territorial secretary.

Q. That's Bobby Lee? A. Bobby Lee.

Q. In other words, you weren't represented at this meeting by your lawyer, Herbert Lee?

A. No, sir.

Q. Now, please tell his Honor what happened at this meeting as you remember it.

A. Olson complained that he wasn't getting fights and I wasn't paying his living expenses, bills, phone bills, lights, and so forth, and I explained to the boxing commission that I had a contract with Leavitt, I had my hands tied and I couldn't get the boy fights until his contract with Leavitt was disaffirmed. So then they told us to go out and settle our own matters. [102]

Q. Now, did you say anything to the commission on that occasion about having paid any bills for Olson?

A. I told them that I had some cancelled checks which showed that I took care of Olson's bills and his grocery bills, and so forth, and that I would gladly show the commission.

Q. I see. Then what was the result of that meeting?

(Testimony of Herbert Vincent Campos.)

A. We had another meeting on the 26th of February.

Q. Well, I mean, what was the result of this meeting?

A. Well, they told us to go out and settle our own affairs—straighten up our own affairs as best that we can.

Q. I will next show you some minutes, which are marked Plaintiff's Exhibit 13, of the meeting held on February 26th, 1951, and at the end of which appears a notation that there was an executive session, which reads: "There being no further business the commission adjourned to go into executive session to discuss the Campos-Olson situation, with all parties concerned in the case. After the discussion, the commission advised them to get together and try to straighten out the matter among themselves, which was agreeable to all concerned."

Now, tell us what happened during the executive session.

Mr. Ellis: Just a moment. Who was present?

Mr. Clark: Oh, the minutes show that.

Mr. Ellis: They don't show the executive session.

Mr. Clark: Well, the minutes show that in the October 26th meeting—— [103]

The Court: February 26th.

Mr. Clark: February 26th meeting. I am sorry. The February 26th meeting, there were present——

Mr. Ellis: Mr. Clark, I want the recollection of this witness.

(Testimony of Herbert Vincent Campos.)

Mr. Clark: Oh, I misunderstood you. I thought you wanted to know who was present.

Q. Who was present at this executive session?

A. I believe there was Herbert K. Lee, attorney.

Q. Yes.

A. Bobby Lee, Dr. Withington, Leon Sterling.

Q. Who is Dr. Withington?

A. He is the chairman of the Territorial Boxing Commission. Mr. Stagbar.

Q. He is a commissioner?

A. Yes, sir. Andrew Mitsukado—he is the “Advertiser” reporter; he was there. Sharkey Wright, I believe Tommy Miles——

Q. You think Tommy Miles was present at that meeting?

A. Yes, sir.

The Court: Olson present?

The Witness: Yes, Olson was present.

Q. (By Mr. Clark): And you were present?

A. And I was present.

Q. Now, with the commissioners you have named, I think you have named Dr. Withington, Mr. Stagbar, Mr. Sterling—— [104]

A. Sterling.

Q. Anybody else you remember?

A. I don't know whether Sherman Dowsett was present or not.

Q. You don't know whether he was present?

A. No.

Q. How about any other commissioner?

A. I think that is all they had there. I am not

(Testimony of Herbert Vincent Campos.)

sure. Stagbar, Leon Sterling, Dr. Withington, Sherman Dowsett.

Q. How about Donovan Flint?

A. Donovan Flint, that is right.

Q. You think he was there? A. Yes, sir.

Q. All right. Now, tell us what happened—by the way, this was after the main meeting, I take it?

A. Yes, sir, executive session meeting.

Q. Executive session, held in the same room?

A. Yes, sir.

Q. Tell us as near as you can recollect what happened.

A. Well, Olson complained about getting some fights which he wanted to fight and that I wasn't paying his bills, and so forth, and I told the boxing commission again he was still under contract to Leavitt and that I couldn't get any fights. And then I produced my cancelled checks showing I had been paying all Olson's living expenses.

Q. Now, you say you produced cancelled checks. What did [105] you do with them physically?

A. I gave the cancelled checks—I handed the cancelled checks over to the commissioner, Stagbar, and Mr. Stagbar went through the cancelled checks and also passed them on to Commissioner Leon K. Sterling.

Q. Now, what the conclusion of that meeting?

Mr. Ellis: What happened at the meeting?

Q. (By Mr. Clark): What happened at the meeting?

(Testimony of Herbert Vincent Campos.)

A. The commission felt that I had done my duty and my best——

Mr. Ellis: Object to what the commission felt.

Q. (By Mr. Clark): Tell us what was said.

A. The commission told us to try and settle our affairs.

Q. Was there any statement made at all as to what conclusion the commission came to?

A. They stated that I had lived up to my contract.

Mr. Ellis: Just a moment.

A. (Continuing): I had paid Olson's——

Mr. Ellis: That calls for his conclusion.

The Court: Yes.

Mr. Clark: No, it calls for a statement.

The Court: All right. What you said and what did they say?

The Witness: Dr. Withington stated——

Q. (By Mr. Clark): The chairman of the commission? A. Yes, sir. [106]

Q. Give us in substance whatever statement he made on that subject.

A. He stated that he couldn't see any wrong that I was doing, and that I was keeping up to my contract.

Q. Very well. Now, after that meeting on February 26th, 1951, Mr. Campos, did you have any further discussions up until, oh, we will say, June——

A. Well, the next week——

Q. Just a minute. (Continuing): ——in which

(Testimony of Herbert Vincent Campos.)

Olson made any complaints to you?

A. No, sir.

Q. Olson's ring record shows then after you got out of the Leavitt contract he had a fight on May 7th with—March 20th, rather—with Art Soto, and one on May 7th with Lloyd Marshall.

Now, did you then enter into any contract with the Promotions of Hawaii, Limited, for a further fight with Chuck Hunter? A. Yes, sir .

Q. Am I correct in stating that that fight was first scheduled for June 19th? A. Yes, sir.

Mr. Ellis: Your Honor, could I have an instruction about the leading questions?

The Court: Of course, this has already been put in evidence, the minutes—— [107]

Mr. Clark: The minutes of the meeting showing——

The Court: The minutes of the commission showing that on the 28th of May the Hunter fight was approved, on the 12th of June continuance was approved, and on the 18th of June cancellation was applied for which the next day was granted.

Mr. Ellis: I don't think there is anything introduced in evidence in regard to a further contract with Chuck Hunter.

Mr. Clark: Oh, yes, there is. The commission approved the Chuck Hunter fight.

The Court: Exhibit 15 is the minutes of May 28th in which they approved the fight between Olson and Chuck Hunter.

Mr. Ellis: I understood him to ask this witness

(Testimony of Herbert Vincent Campos.)

whether he had entered into another contract for the Chuck Hunter fight.

The Court: In addition to that?

Mr. Ellis: In addition to that.

Mr. Clark: No, your Honor.

The Court: I don't think so.

Mr. Clark: My question was, did he enter into a contract with the promoter for a fight between Olson and Chuck Hunter which had to be true unless the commission wouldn't have approved the fight.

The Witness: That's right.

Q. (By Mr. Clark): You did? A. I did.

Q. All right. As the minutes state, that fight was first [108] set for July 19th? A. Yes, sir.

Q. Isn't that right? Now, Mr. Campos, I want to show you some further minutes which have been put in evidence of a meeting of the Territorial Boxing Commission held on June 19, 1951, at which were present Dr. Paul Withington, Chairman, J. Donovan Flint, Leon K. Sterling, Jr., Arthur Stagbar, Robert M. Lee—that's the secretary of the commission, isn't that right? A. Yes, sir.

Q. Herbert Campos, Carl Olson, Lau Ah Chew and James Spagnola, at which the cancellation, the final cancellation of the Chuck Hunter fight, was approved by the commission. A. Yes, sir.

Q. Now, after having had those minutes called to your attention, can you tell us whether there was any meeting subsequent to that concerning your relationship or concerning you and Carl Olson?

(Testimony of Herbert Vincent Campos.)

A. No, sir. I mean, after that—after this date?

Q. Well, you will notice that these minutes talk only of the cancellation of the Chuck Hunter——

The Court: He is calling your attention to the fact that there was some sort of an executive session afterwards. He wants to know whether you were there.

The Witness: Yes, sir, after the special meeting—I mean the regular meeting, we had a special session. [109]

Q. (By Mr. Clark): That is my question, Mr. Campos. Having called the formal minutes of this meeting to your attention, was there a further special meeting held on that same day after the Chuck Hunter fight was——

A. Yes, we had a special executive meeting.

Q. A special executive meeting?

A. Yes, sir.

Q. And tell us who was there, as nearly as you can recollect.

A. There was Donovan Flint, Commissioner Donovan Flint, Commissioner Stagbar, Dr. Withington, Leon Sterling, Tommy Miles was present, I believe.

Q. Who?

A. Tommy Miles. Sharkey Wright. I think that's all.

Q. Olson was there?

A. Carl Olson and myself and Spagnola.

Q. And you think Spagnola?

A. Yes, sir.
Mr. Ellis: What was the time of that meeting?

(Testimony of Herbert Vincent Campos.)

Q. (By Mr. Clark): About what time of day was it?

A. I think it was right after noontime.

Q. Right after noontime?

A. Yes; about 12:15 or 12:30—around there.

Q. Around 12:30. All right. Now, please tell his Honor what, if anything, was said about you and Olson at that meeting, and by whom. [110]

A. Olson stated that he wanted to come up to the mainland to fight under Sid Flaherty, and that I couldn't get any fights and he wanted to come up and fight under Sid Flaherty. And I stated—I told the commission I had contacted Sid Flaherty in May and that Sid Flaherty answered that he couldn't get any fights with anyone to manage the boy, training the boy, and I also stated that I would not stand in the way Olson making a living in the fight game and that the could go to the mainland provided that I had my contract rights, and also I would get Olson a trainer on the mainland.

Q. What, if anything, did any of the commissioners reply to that? Was anything said to it?

A. Well, they didn't say much about it. They told us to go out and settle our own affairs, and they didn't give a definite answer on the contract basis or anything else.

Q. They did what?

A. They did not give a definite answer on the——

Q. Oh, they did not say—do anything about the contract?

A. That's right.

(Testimony of Herbert Vincent Campos.)

Q. All right. Now, was that substantially all that happened at that meeting? A. Yes, sir.

Q. Then what happened so far as Olson was concerned?

A. Then a couple of days afterwards I read in the paper, I believe, that Olson was on the mainland already, and I wrote [111] the boxing commission immediately stating that Olson had left for the mainland and that I wanted them to protect my one-third share of the rights on the contract.

Q. By that, Mr. Campos, do you refer to the letter which has been marked Plaintiff's Exhibit 19?

A. Yes, sir.

Mr. Clark: Does your Honor want to take the recess at this time?

The Court: You wish a recess?

Mr. Clark: Yes.

The Court: Take a brief recess.

(Short recess.)

Q. (By Mr. Clark): Mr. Campos, you stated just before the recess that during the commission meeting on June 19th you mentioned the fact that you had contacted Flaherty in May about the possibility of getting further fights for Olson on the mainland. Do you remember that testimony?

A. Yes, sir.

Q. I want to show you in that regard a confirmation copy of a radiogram dated May 11th, 1951, addressed to Sid Flaherty, care of California State Athletic Commission, San Francisco, and signed

(Testimony of Herbert Vincent Campos.)

“Herbert Campos.” Did you send the original of that on or about that date? A. Yes, sir.

Mr. Clark: We will offer it in evidence, your Honor. [112]

The Clerk: Plaintiff’s Exhibit 29 introduced and filed into evidence.

(Confirmation copy of radiogram dated May 11, 1951, admitted in evidence and marked Plaintiff’s Exhibit 29.)

Q. (By Mr. Clark): I will also show you, Mr. Campos, what purports to be a letter dated May 22, 1951, addressed to Mr. Herbert Campos, Honolulu, T. H., “Dear Mr. Campos,” and signed “Sid E. Flaherty.” Did you receive that letter in response to the radiogram you just identified?

A. Yes, sir.

Mr. Clark: We will offer it in evidence, your Honor, as Plaintiff’s Exhibit next in order.

The Clerk: Plaintiff’s Exhibit 30 introduced and filed into evidence.

(Letter dated May 22, 1951, Sid E. Flaherty to Herbert Campos, admitted in evidence and marked Plaintiff’s Exhibit 30.)

Mr. Clark: The radiogram, Plaintiff’s Exhibit 29, reads as follows: “Sid Flaherty, care California State Athletic Commission, San Francisco, California. May 11, 1951. Would like you to arrange a couple fights for Olson this month answer me if possible care Mackay Radio. Herbert Campos.”

(Testimony of Herbert Vincent Campos.)

And the reply, Plaintiff's Exhibit 30, reads as follows:

"Mr. Herbert Campos, Honolulu, T. H.

"Dear Mr. Campos:

"Have thought the situation over very carefully concerning Carl fighting one or two fights here [113] in California. Frankly if we had a young middleweight who was drawing big gates and Carl came over to box him, we might draw some money. The only publicity Carl received here was when he boxed Ray and it was all bad. His win over Soto doesn't mean anything, Soto just was beat the other night by a kid fighting his first ten. I handled Marshall for a long time and told him to quit fighting two years ago when I released him. I don't say Carl couldn't be developed into a card here, but it would take time.

"Drop me a line when you have the time and please send me your home address.

"Sincerely,

"Sid E. Flaherty."

This being dated, your Honor, in May, 1951.

Q. Now, Mr. Campos, directing your attention to Olson's ring record, which is Plaintiff's Exhibit 5 in this case, and which shows that commencing with October 12th, on October 12th, 1948, with Boy Brooks in Honolulu and up to the fight of May 7th with Lloyd Marshall, Honolulu, which Olson won by a knockout in the fifth round, I will ask you if you arranged each and all of those fights.

(Testimony of Herbert Vincent Campos.)

A. Yes, I did.

Q. Now, on the occasion of your going to Philadelphia with Olson for the purpose of the Robinson match in October, 1950, [114] you at that time were licensed as a manager under Hawaiian law?

A. Yes, sir.

Q. What, if anything, was required of you by the Pennsylvania State Athletic Commission in order to appear with Olson in Pennsylvania?

A. I had——

Q. Against Robinson.

A. I had to obtain a license there also.

Q. All right. You did obtain a license?

A. Yes, sir, a manager's license.

Q. Did you produce any contract between you and Olson?

A. I produced both my civil worldwide contract and my Territorial Boxing Commission contract.

Q. By your "civil worldwide contract" do you refer to the document that is annexed to the complaint as Exhibit B, the 10-year contract?

A. Yes, sir.

Q. And the Territorial contract form a contract you referred to is the one which is annexed as Exhibit A to the complaint?

A. Yes, sir.

Q. Is that right? Did you have any trouble about getting a license?

A. No, sir.

Q. Very well. Now, how about when you took Olson to Sydney, Australia, to fight Dave Sands. What was required of you there? [115]

A. My contracts with Olson.

(Testimony of Herbert Vincent Campos.)

Q. Your contracts with Olson; the same ones you have talked about? A. Yes, sir.

Q. Just talked about? A. Yes, sir.

Q. Did they license you there? A. Yes, sir.

Q. Have any trouble about that?

A. No, sir.

Mr. Clark: You may cross-examine.

Cross-Examination

By Mr. Ellis:

Q. Mr. Campos, what is your occupation as manager of the Campos Dairies, I think you said you were; what do you do?

A. I used to be manager. I am bookkeeper and assistant office manager now.

Q. Bookkeeper now? A. Yes, sir.

Q. And assistant office manager?

A. Yes, sir.

Q. What are you, a registered accountant, down in the islands? A. What is that?

Q. A registered accountant?

A. No, I am not. [116]

Q. You are not licensed as an accountant?

A. No, sir.

Q. You are a bookkeeper? A. Yes, sir.

Q. You keep the books for the Campos Dairy?

A. Just lately.

Q. Is that a large dairy? A. Yes, sir.

Q. And what type of books do you keep?

A. Double entry.

(Testimony of Herbert Vincent Campos.)

Q. Double entry system? A. Yes, sir.

Q. How many years have you been doing that?

A. It is about ten years.

Q. Ten years. You were doing that, then, prior to your first contract with Bobo Olson?

A. Yes, sir.

Q. When did you have your first contact with the boxing game in any official capacity?

A. 1948.

Q. With whom? A. Carl Olson.

Q. Prior to that time you had never had any boxing experience as a manager or otherwise, is that correct? A. No, sir. [117]

Q. Did you know anybody in the boxing game at that time?

A. Well, I believe I knew Tommy Miles, but I don't think he was in the boxing game at that time.

Q. Was he in the commission at that time?

A. No, sir.

Q. But he had been on the commission, is that right? A. Yes, sir.

Q. Speaking of the Territory of Hawaii Commission.

Yes, sir. I also knew Sharkey Wright.

Q. You knew Sharkey Wright before you took on Bobo Olson? A. Yes, sir.

Q. Did you have any connections on the mainland with reference to boxing? A. In 1948?

Q. 1948. A. No, sir.

Q. What promoters did you know in the Terri-

(Testimony of Herbert Vincent Campos.)

tory of Hawaii in 1948 at or about the time you took on Olson?

A. Augie Curtis, Leo Leavitt. I think that's the only two matchmakers they had in Honolulu at the time.

Q. You speak of them as matchmakers. I spoke of them as promoters. If you know, what are the duties of a matchmaker?

A. Well, a manager of a fighter goes down and talk to this matchmaker, and he arranges or tries to get a bout with the manager's consent. [118]

Q. In other words, the——

A. He promotes the fight.

Q. The manager of the fighter contacts the matchmaker with the view of obtaining fights, is that correct? A. Yes, sir.

Q. Now, who were the promoters? Are they a different breed?

A. No, that is the same persons I am talking about. The matchmakers.

Q. The same, the matchmakers. At or about the time you took on Bobo Olson as his manager, what other activities were you engaged in?

A. I think in 1949 I was in the contracting business; real estate—back in '42 and '43 I was in the real estate business.

Q. But in 1948 what other business besides this management of the Campos Dairy?

A. I went in the contracting business in '49.

Q. '49? A. Yes, sir.

Q. So you were engaged in the contracting busi-

(Testimony of Herbert Vincent Campos.)

ness in 1949? A. Yes, sir.

Q. Any other type of activity?

A. Managing the ranch, is about all.

Q. Managing the ranch. That is your brother's ranch, Lawrence Campos Dairies?

A. Yes, sir. [119]

Q. How much time were you spending in managing the ranch per day and how much time in the bookkeeping? Can you give me any idea of that?

A. I started at seven o'clock in the morning and get through about three o'clock.

Q. From seven in the morning to three in the afternoon? A. That is right.

Q. And in this contracting business, how much time did you devote to that?

A. That was only a part time.

Q. Part time? A. Yes.

Q. That was in addition to your management of the ranch and your bookkeeping duties?

A. Yes, sir.

Q. Is that right? Now, before you took on this boxing contract or agreement with Olson in 1948, the 1948 agreement that has been referred to as Exhibit A in the complaint, did you consult anyone about the advisability of embarking upon the boxing field?

A. Well, I spoke to a couple of people about it; my nephew Tommy know something about the boxing game.

Q. A little louder. We can't hear you.

A. My nephew Tommy knew something about

(Testimony of Herbert Vincent Campos.)

the boxing game, and he knew Olson pretty well and he knew Sharkey Wright and he [120] is the one, in fact, that introduced me to Carl Olson—Tommy Campos.

Q. Tommy Campos, your newpew?

A. Yes.

Q. Introduced you to Carl Olson?

A. Yes, sir.

Q. How old was Tommy Campos?

A. Well, probably about 28 years old.

Q. About 28? A. 28 or 29.

Q. Was he a pal of Bobo Olson?

A. Well, not considered a pal. I mean just a friend.

Q. A friend. You consulted your nephew about the advisability of going into the arrangement with Olson, is that correct?

A. Yes; and also Sharkey Wright.

Q. Sharkey Wright? A. Yes, sir.

Q. Anyone else? A. I don't recall.

Q. Did you discuss it with Tommy Miles, the party you mentioned here on several occasions?

A. I spoke to Tommy Miles back in **October or November, 1948.**

Q. That was the first time you talked to him, in November or October of 1948?

A. Yes, sir; about the Olson case. [121]

Q. Did you talk to a Mr. Spagnola?

A. I believe I met Spagnola in 1949, I believe.

Q. Did you talk to a Mr. Leo Leavitt?

(Testimony of Herbert Vincent Campos.)

A. Leo Leavitt? We were supposed to enter into a contract with Leo Leavitt, I believe, in 1950. March, on my return from Australia.

Q. I am not talking about that. You say you knew a couple of matchmakers; one of them was Leo Leavitt? A. Yes, sir.

Q. I want to know whether before you entered into this arrangement with Olson whether you talked with Mr. Leo Leavitt as to the advisability of going into this case? A. No, sir.

Q. Never had any discussion? A. No, sir.

Q. To again orient you, did you ever have any discussion at the same time or prior to entering into, or just about the time you were considering entering into the contract with Olson a discussion with James Spagnola?

A. I met Spagnola in 1949, I believe.

Q. Never met him before that?

A. No, sir.

Mr. Clark: The answer to the question would be no, then, your Honor.

Q. (By Mr. Ellis): Did you contact any members of the [122] Boxing Commission at that time?

A. After signing the contract?

Q. No, just before. A. No, sir.

Q. After signing that, immediately after signing that contract, did you contact anyone on the Boxing Commission in Hawaii?

A. After signing the contract with Olson I had to go about and learn the boxing game, then.

Q. So you went to the Commission to learn the boxing game?

(Testimony of Herbert Vincent Campos.)

A. Well, I spoke to boxing people then, that is when I started contacting the boxing people, the matchmakers.

Q. Pardon me, did I interrupt?

Mr. Clark: Yes, he said "matchmakers."

Q. (By Mr. Ellis): You found out from them who the matchmakers were, is that right?

A. No, sir, I contacted matchmakers to get fights for Olson after signing my contract.

Q. Now, did you subsequently learn what your duties as manager were?

A. Well, I got a book from the Territorial Boxing Commission on the laws. I didn't read it all, not all, I mean. but in substance.

Q. In other words, the Boxing Commission then furnished you with a copy of the rules and regulations which have been [123] introduced here in evidence, is that correct?

A. That's right.

Q. Now, referring to Plaintiff's Exhibit 2, entitled "Memorandum of Agreement," dated July 14, 1948, I call your attention to that so you will know what I am talking about. That agreement that I have just shown you, memorandum of agreement, so dated, between Herbert Campos and Carl E. Olson, ring name Carl "Bobo" Olson, has on it, "Received Territroial Boxing Commission by Kim," dated July 16, 1948.

Did you file that with the Territory of Hawaii Boxing Commission, or did you have it filed by someone else?

A. I filed it.

Q. In person?

A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Q. And it was stamped as of the date you filed it, is that correct? A. Yes, sir.

Q. It also has on it, "Approved 7-19-48, Territorial Boxing Commission," and it is signed by some first name I can't read, but Kim, appears to be William Kim.

A. He was the Territorial Boxing Commission secretary at the time.

Q. Was he the secretary at that time?

A. Yes, sir.

Q. That contract was filed by you and approved by the [124] Commission, and was it the agreement under which you were working under the Territory of Hawaii with the Hawaiian Boxing Commission, is that correct? A. Yes, sir.

Mr. Clark: At what time, your Honor? At this time or later?

Mr. Ellis: At the time it bears the date.

Mr. Clark: It bears the date of July 14, 1948.

Mr. Ellis: July 14, 1948.

The Witness: Yes, sir. I also had a civil worldwide contract at the same time.

Q. (By Mr. Ellis): I understand you claim you did. Did you ever file with the Territory of Hawaii the so-called worldwide contract which you have just referred to, which was for five years?

A. No, I did not.

Q. You did not. Now, taking up the matter of the pursuance of your duties, after you had signed up Olson under the Territory of Hawaii Boxing memorandum of agreement, you said you contacted

(Testimony of Herbert Vincent Campos.)

the matchmakers. And what did you do after that?

A. We got Olson fights.

Q. All right. Well, what do you mean by "we"? Who is "we"?

A. Well, the promoters and myself.

Q. Who was the promoter? [125]

A. Whoever it was, Augie Curtis and Leavitt.

Q. Either Augie Curtis or Leo Leavitt?

A. Yes, sir.

Q. What did you do about getting the fights? Can you explain what you did?

A. Well, I contacted the matchmaker and made arrangements to import the fighter, to get the fighter down to fight Olson.

Q. That is what I want to find out, just what you did. You contacted the matchmaker. Then what did you do? You tell him you have Olson on your hands and want some fights, is that correct?

A. That is right, and then he would contact fighters here, or we would contact the fighters here, that we wanted to get down to fight Olson, and then get Olson in shape.

Q. You say "we" again. Who is it that works up the fights, the matchmaker or you?

A. The matchmakers.

Q. The matchmakers. So you tell him you have got a boy and you want fights, and then he tries to get fights for you, is that correct? A. Yes, sir.

Q. So when we look at this record here in 1948 commencing with Boyd Brooks, October 12, who got Boyd Brooks to fight Bobo Olson? [126]

(Testimony of Herbert Vincent Campos.)

A. I believe it is in evidence here.

Q. Well, was it Leo Leavitt or was it Augie Curtis? A. I believe Augie Curtis.

Q. Augie Curtis. And he dug up that Boyd to fight?

A. Through my efforts, I believe I went to contact him.

Q. All right, that is what I want to find out. What did you do? Let's have you tell me. Who did you go to see, how did you arrange it?

A. I went to see the matchmaker and told him.

Q. That was Augie Curtis?

A. That's right, and told him.

Q. What else did you do?

Mr. Clark: Just a moment. Let the man finish his answer, your Honor.

A. (Continuing): I went down to see the matchmaker, Augie Curtis, and told him we wanted to arrange a fight for Olson and if he could contact me any fighters in that class. And then he would show me that he could get probably some fighters up here, and then we arrange and go into a contract to fight a certain fighter.

Q. Well, what I am trying to develop here, Mr. Campos, is who actually does the work in finding a fighter. It is the matchmaker, is it not?

A. Well, yes, both of us. We have to work together. I mean, if he picks a fighter that is not suitable for Olson, then I [127] would object to it.

Q. Well, how much experience had you had in the fighting game as of this time, October of 1948?

(Testimony of Herbert Vincent Campos.)

A. Well, I had about a month, I believe.

Q. Prior to that time had you followed the boxing game and all the fighters, knew all about them?

A. Not too much. I mean, I read about them in the papers, what not.

Q. So you had to rely upon somebody, didn't you, to find the fighters for you; that was the matchmaker, right?

A. That is right.

Q. Where did they get hold of Boyd Brooks? Where did he come from?

A. Boyd Brooks, I believe, came from the Philippines. I think he fought around in the Orient, Singapore.

Q. Around where?

Mr. Clark: The Orient.

The Witness: The Orient.

Q. (By Mr. Ellis): Did you bring him in from the Orient to fight?

A. The promoter brings the fighter down for the match.

Q. You use a promoter and matchmaker in the same category. They mean the same thing?

A. Yes, they mean the same thing.

Q. So the promoter has the duty, then, of bringing somebody [128] in if you haven't got anybody in the Islands to promote the fights, is that right?

A. That's his livelihood. The promoter promotes the fight and he makes a profit, a share of it.

Q. As a matter of fact, you don't have anything to do with procuring the fighters, do you?

A. Oh, yes, we have.

Q. Not "we"; I am talking about you.

(Testimony of Herbert Vincent Campos.)

A. Yes, I have, picking the fighters. I mean, you can't start off Olson from a young boy and bring down some champion right off the bat. The boy is not ready for them yet.

Q. What else did you consult about, shall we say, the qualifications of the challengers, speaking now of the parties that are going to fight Olson?

A. My trainer, Sharkey Wright, he was the best in the Islands.

Q. You did consult him as to the advisability of matching this boy with this fellow?

A. Yes, sir.

Q. And the approval of the match depended upon whether Sharkey Wright, the trainer, felt he was a proper, shall we say, setup for your boy?

A. The manager has the final say to sign the contract for the fights.

Q. But if Sharkey Wright—you consulted him, you say—if [129] he didn't approve—if he didn't approve, would you go ahead and put him in anyway?

A. I trusted his knowledge of the boxing game.

Q. You relied on his judgment?

A. Yes, sir.

Q. Yes. All right, that's Brooks. The next man is October 26, Kenny Watkins. Was he a local boy?

A. He was imported—I mean, from the mainland.

Q. You imported him from the mainland?

A. Yes, sir.

Q. Who got him?

(Testimony of Herbert Vincent Campos.)

A. Goes along the same line; every fight has the same principle.

Q. Was that Augie Curtis or Leo Leavitt?

A. Curtis.

Q. The next one is John Boski.

A. Boski is a Honolulu boy.

Q. Local boy? A. Local boy.

Q. Did you know him before this fight?

A. Yes, sir.

Q. Did you go out and get him, too?

A. Well, we could see by his record, and went by his record.

Q. Who did that looking up of the record?

A. We did, the trainer and myself. [130]

Q. The trainer and yourself. What records are you referring to, the Ring Magazine?

A. Well, they have records also in the Territorial Boxing Commission office. They have records of all the fighters there.

Q. They have this Ring Magazine, don't they?

A. Yes, and they have records of the Island boys, too, on their standings.

Q. Local boys and outsiders as well?

A. Yes.

Q. Paulie Perkins was the next one. He comes on January 11, 1949.

A. Paulie Perkins is from the mainland.

Q. Who got him? Leavitt?

A. The promoter and myself.

Q. Yourself?

A. Augie Curtis and myself.

(Testimony of Herbert Vincent Campos.)

Q. Still working through the matchmaker, Augie Curtis? A. I believe so.

Q. Sure that wasn't Leavitt?

A. Well, I am pretty certain it was Augie Curtis. This is just from memory.

Q. By the way, did you work with a Mr. Spagnola as a matchmaker getting matches?

A. He acted as my agent in the latter part of 1949 here on [131] the mainland.

Q. Did he have anything to do with the Anton Raadik fight, March 15? A. No, sir.

Q. Who was that, Curtis or Leavitt?

A. I believe it was Curtis.

Q. On June 3rd, still 1949, Tommy Yarosz.

A. That was Curtis also.

Q. That was Curtis? A. Yes, sir.

Q. July 26th, Milo Savage. Is he an importation? A. Was that 1949?

Q. 1949, still 1949.

A. It could be Curtis or Al Karasick. We had a wrestling promoter there that finally got into the boxing game as matchmaker also to promote boxing. It could be him. I am not certain.

Q. Was that Al Karasick?

A. Al Karasick.

Q. He did get in and become a matchmaker, did he not, in the Islands? A. Yes, sir.

Q. August 23 is the next one in 1949, Art Hardy. Who got him?

A. It could be Karasick or Augie Curtis, I don't remember [132] offhand.

(Testimony of Herbert Vincent Campos.)

Q. You are positive so far that none of these were obtained by Spagnola? A. Yes, sir.

Q. Now then, we come down to the Johnny Duke—November 22, Johnny Duke, that we have talked about here so far. Where did he come from?

A. Came from the mainland here.

Q. Who sent him down?

A. Augie Curtis and myself.

Q. By the way, when these fighters are brought in from the mainland or brought in from Manila or Singapore or any place other than the Islands, Honolulu, do you know how they are obtained—you say the matchmaker gets them—who does he work through?

A. Well, the matchmaker contacts the fighter's manager here on the mainland and that's how they come to an agreement, the percentage of the gate, what the mainland fighter is going to get, and how many roundtrip tickets and so forth; and after that arrangement has been made then we go into the agreement of signing the contract.

Q. The fighter that is to be brought in will demand a certain percentage of the gate?

A. That is right.

Q. A certain fee? [133] A. That is right.

Q. Does he also sometimes demand a guaranty?

A. They have a guaranty and percentage of the gate, whichever amount is greater.

Q. And unless you can agree as to that guaranty, the fighter will not come down. Is that about the way it works? A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Q. From your experience what do you find to be the result; if he is a good fighter from the mainland, they demand a large guaranty, or are they willing to accept a percentage of the gate?

A. Well, it all depends on the type of fighter. If he is a pretty well known fighter, his demand is greater, and if his standing wasn't too well, then his demands would be smaller.

Q. In other words, it depends upon the rating?

A. The rating of the fighters.

Q. The rating of the fighters they are trying to bring in. Now, to clear up one point. Although the Johnny Duke fight was postponed it was finally fought and Olson fulfilled his obligation as far as that contract was concerned, did he not?

A. Yes, sir.

Q. And the suspension then existing against him was lifted? A. Yes, sir.

Q. Was it lifted after the Johnny Duke fight or after he got [134] back there to fight him?

A. I believe the suspension was lifted when Olson got into the ring, and that it was officially lifted when the fight is on.

Q. It was automatic when they found him in the ring? A. Yes, sir.

Q. Now, in 1950, the first fight was February 22, John Lee. Was he a local boy?

A. Mainland boy.

Q. Mainland boy. Most of these boys that we have mentioned so far were from the mainland?

A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Q. How did you contact him?

A. I don't know whether that was through Augie Curtis or Al Karasick. On the same principle as all the other fights, past fights I have mentioned.

Q. Not with Leo Leavitt? A. No, sir.

Q. Did you secure any fights from Leo Leavitt during 1950 at all?

A. Well, he wanted to enter into a contract, I believe, in 1950, which didn't go through at the time.

Q. He did not produce any fighters for you at all during the year 1950, is that correct?

A. Yes, sir. [135]

Q. I believe you stated that he did not produce any fighters for you in 1949, is that correct?

A. I believe so, yes.

Q. Or in 1948? A. Yes, sir.

Q. Now, we come to March 20, Dave Sands, Sydney, Australia. Who was the matchmaker there?

A. I believe I contacted Al Karasick for that match.

Q. And Karasick obtained that match down there? A. Yes, sir.

Q. Did Mr. Spagnola have any connection with that match?

A. No, sir, he went along on the trip. He had a fighter of his own.

Q. Henry Davis? A. Yes, sir.

Q. You are quite certain he had nothing to do with arranging that or bringing that possibility to

(Testimony of Herbert Vincent Campos.)

your attention? A. Yes, sir.

Q. Is that right? April 25, Roy Miller, Honolulu. That was a fight in Honolulu. Where did he come from? A. I believe from the mainland.

Q. You believe he is from the mainland. Do you know who produced him?

A. Well, there's two promoters, Augie Curtis and Al Karasick, so it could be—I think we have in evidence here—[136] might state Al Karasick and it could be Augie Curtis, but we have that in evidence.

The Court: Well, it's one or the other?

The Witness: One or the other.

The Court: Can't you summarize this examination, counsel? It's repetitious. One question would do for all of them, wouldn't it?

Q. (By Mr. Ellis): Let's take the Otis Graham, Henry Brimm and Ray Robinson—drop the Ray Robinson for the time being; the other two in '50 were Graham and Brimm. They would either be—those fights promoted through Augie Curtis or Al Karasick, is that right?

A. Or probably Lau Ah Chew, I don't know whether Lau Ah Chew came in at that time or not.

Q. Lau Ah Chew is another promoter from down there? A. Yes.

Q. He might have come in on one of those?

A. Yes, sir, I am not certain.

Q. The Ray Robinson fight in October of—October 26 of 1950, in Philadelphia, who promoted that one?

(Testimony of Herbert Vincent Campos.)

A. That—I contacted Al Karasick and he is the one that got the Robinson match.

Q. Did Mr. Spagnola have anything to do with that at all?

A. Well, Spagnola, he was on the mainland here trying to get the Robinson fight. He came pretty close to it, but I don't [137] know, he didn't get it at all; he made an effort to get it, and then Karasick got the match.

Q. As a matter of fact, didn't Spagnola forward to you the contracts to be executed on the Robinson fight?

A. Well, he wasn't certain of getting the fight; he didn't have Robinson signed up, as I say.

Q. Didn't he have him signed up at Chicago?

A. No, sir.

Q. You are positive about that?

A. I am pretty positive.

Q. Pretty positive?

Mr. Clark: Well, there was no fight in Chicago, Mr. Ellis.

Mr. Ellis: I know there was no fight in Chicago.

Mr. Clark: Except on Friday night there was.

Mr. Ellis: The contract was for Chicago originally, ultimately fought in Philadelphia.

Q. (By Mr. Ellis): As a matter of fact, Al Karasick was brought in by you, was he not, and changed that fight from Chicago to Philadelphia?

A. No, sir.

Q. Is that a fact?

(Testimony of Herbert Vincent Campos.)

A. No, sir; he made the contacts—Karasick made the contacts, and that fight was in Philadelphia.

Q. Were you still consulting the trainer, Sharkey Wright, [138] in regard to whether this was a suitable opponent throughout the year 1950 before these fights were brought about?

A. We spoke about it. We got together and as a team managed the boy, and we agreed upon fighting Robinson, for a fight.

Q. Sharkey agreed that was the appropriate time to run your boy against the champion?

A. That is his duties as trainer, the boy is fit.

Q. Now, we come to the year 1951, and March 20 we had Art Soto; May 7 we had Lloyd Marshall. The matchmaker for those two was either——

A. Lau Ah Chew, I believe.

Q. Lau Ah Chew. We now have a new matchmaker in the picture?

A. Yes, sir.

Q. It was not Karasick or Augie Curtis?

A. Yes, sir.

Q. Now, Mr. Campos, there has been some mention of rating of fighters. I believe you testified that your boy Olson at the time you were managing him in 1949 was rated, is that correct?

A. Yes, sir.

Q. And where did you find that out?

A. We have the ring book there which rates the boys—I mean, the fighters. There was about a month after the Yarosz fight that he was ranked No. 8 or 7, I am not sure what. [139]

(Testimony of Herbert Vincent Campos.)

Q. I call your attention to a copy of the Ring Magazine, November, 1949—have you seen those—and ask you if that is what you are referring to, calling your attention to page 38, ring ratings for the month ending September 15, 1949, in the 160-pound class. You notice Olson is rated No. 8 on that listing; did you notice that?

A. That's right.

Q. Is that the source from which you secured your information? A. That is right.

Q. That you are referring to? That is?

A. Yes, sir.

Q. That was November of 1949. What was Olson's rating, if you know, in February of 1950?

A. I don't recall his rating in 1950.

Q. Do you know what, as his manager, what his rating was in December of 1949?

A. I don't know.

Q. What?

A. I don't know, I don't recall.

Q. Do you know how he was rated any time during the year 1950, if rated at all?

A. I don't recall.

Q. You don't recall? Now, do you know whether he was rated at all for the year 1951, January 1 to June 1, 1951? [140] A. I don't know.

Q. Now, so far in explaining your duties as a manager you have said that it was you who consulted the matchmaker to see about getting bouts. What else were your duties as a manager?

A. Have to furnish him a good trainer, sparring

(Testimony of Herbert Vincent Campos.)

partners, and the interests of the fighter—for the best interests of the fighter, and to get him sufficient bouts.

Q. You were to get sufficient bouts and secure and provide a trainer, and you say sufficient bouts. What kind of bouts?

A. Boxing—I mean, good bouts.

Q. Well, good bouts, what do you mean by that? Something that would advance your fighter's position? A. That's right, yes, sir.

Q. Did remuneration have anything to do with it?

A. Well, I don't know. Well, also, that would be the same thing, you got a good fighter, he fights the better boys, why, he is going to make more.

Q. In other words, get a good fighter, meaning a good drawing card? A. That's right.

Q. You make remunerative fights, is that right?

A. That is right.

Q. And in addition your furnish seconds in the ring—by the way, did you act in the ring for Olson during the time he [144] was boxing?

A. I was in his corner at every fight.

Q. In his corner? A. Yes, sir.

Mr. Clark: What was the answer?

The Witness: I was in his corner at every fight.

Q. (By Mr. Ellis): What did you do in the corner?

A. Well, I took care of the wiping off and giving him water, and Sharkey took care of the essential part of it.

(Testimony of Herbert Vincent Campos.)

Q. Sharkey was there, too?

A. Yes, he is, and I hired other helpers also.

Q. I didn't quite follow what you did, though.

The Court: Said he wiped him off and gave him water.

Q. (By Mr. Ellis): I don't know whether they use the same terms as they do in baseball, but you were the water boy, were you, the one that holds the bottle while he takes a drink?

A. Well, I used to sponge him——

The Court: Well, this is interesting, but I don't see what it has to do with the case.

Mr. Ellis: It is a question of——

The Court: I watch television myself once in a while; it isn't important.

Q. At the time you signed up Olson on this first 1948 agreement, what was he doing at that time? Was he fighting [142] then?

A. What was that?

Q. Olson—what was he doing at the time you entered into this July 14, 1948, memorandum of agreement?

A. I think he just got back from the Philippine Islands. He had fought a boy there by the name of Sebastian.

Q. He was in the fight game, was he?

A. Well, yes, I believe that he was under the management of one Charlie Miller.

Q. At the time you took Olson, he had been a professional boxer, is that right?

A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Q. He was of age in the Territory of Hawaii at that time, was he not?

A. When I signed him to my 1948 contract he was of the legal age in the Territory, 20 years old.

Q. And he was able to fight then legitimately under you or anyone else?

A. Yes, in the Territory.

Q. Was he engaged in any other pursuit at that time? I mean, was he working at any other occupation other than prizefighting or boxing?

A. No, he wasn't working at all.

Q. He wasn't working. His only source of income at that time was boxing, is that right? [143]

A. Yes, sir.

Q. Now, I call your attention, Mr. Campos, to Plaintiff's Exhibit No. 4. It is an alleged document dated July 14, 1948, signed by Herbert Campos and what purports to be Carl E. Olson.

A. Yes, sir.

Q. I call your attention to the fact that that agreement, labeled as such, has no Boxing Commission, Territory of Hawaii stamp on it indicating filing with the Commission.

The Court: He already said he didn't.

Q. (By Mr. Ellis): And no approval.

The Court: Didn't he already say he didn't file it?

Mr. Clark: Yes, he has testified to that.

The Court: He has already testified to that.

Q. (By Mr. Ellis): I notice on there in pencil, "Olson was 21 July 11."

(Testimony of Herbert Vincent Campos.)

Mr. Clark: Just one minute, may it please your Honor. I neglected to do, on the offer of this document, which we did on deposition, and so may I, through your Honor, ask Mr. Ellis for this stipulation: that the pencil notations on the face of the original reading "Olson was 21 July 11" and over on the second page the pencilled figure "10" above the ink "5"—there may be some other similar marks on the document—shall not be considered part of the exhibit. It was explained on the discovery that it was put there when [144] the 10-year contract was drawn by Campos' lawyer in Hawaii a year later. It was not on there at all.

Mr. Ellis: On your representation that that is correct.

Mr. Clark: You heard the evidence, not on my representation.

The Court: It is minor. Get on with this matter, now.

Q. (By Mr. Ellis): I will ask you, Mr. Campos, who prepared this agreement I just referred to? A. I believe it was my attorney.

Q. Which one?

A. Herbert K. Lee, I believe.

Q. Herbert K. Lee? A. Yes, sir.

Q. Did Olson have an attorney in connection with the execution of that agreement?

A. I am not certain; no, I don't think so.

Q. Where was that executed?

A. That was executed in my office in Kailua, the ranch office.

(Testimony of Herbert Vincent Campos.)

Q. Not at your home? A. No, sir.

Q. Who was present at the time it was executed?

A. A notary public, Olson and myself.

Q. Just you, Olson and the notary public? [145]

A. Yes, and there were some other people outside.

Q. But no one there in the presence of you three at the time other than what you have mentioned?

A. I believe that both of these contracts were signed at the same time the Territorial Boxing Commission contract, the worldwide contract.

Q. The one you filed with the Commission down there and this one were signed at the same time?

A. Yes, sir, I believe so.

Q. There was no one there except you, Olson and the notary?

A. Well, we had some boys outside.

Q. I mean, right in there at the time of the execution.

A. Not in the office at the desk, but the fellows were outside.

Q. You mean around in the office?

The Witness: Yes, sir.

Q. (By Mr. Ellis): Well, let me know who was there.

A. Well, there was a fellow who came down with Carl Olson, a friend of his.

Q. What was his name?

A. I don't know whether it was Souza or somebody else. It could have been Fred Souza or some-

(Testimony of Herbert Vincent Campos.)

body else. I don't know who the fellow was at the time that was with Olson.

Q. Are you sure it wasn't Leavitt?

A. Who? [146]

Q. Could it have been Leavitt?

A. No, sir.

Q. Spagnola? A. No, sir. [147]

* * *

Q. (By Mr. Ellis): Now, this July 29, 1949, Exhibit B to the complaint was prepared by whom?

A. By my attorney, Herbert K. Lee.

Q. The same attorney who prepared the other one? A. I believe so, yes.

Q. Where was it executed?

A. Down at my home at 1368 Mokulua Drive, Lanikai.

Q. Did Olson have an attorney representing him? A. No, sir.

Q. Now, when, Mr. Campos, did you deliver a photostatic copy or copy of that 1949 agreement to the Commission in Hawaii? [153]

A. Photostatic copy?

Q. Yes.

A. A couple of days afterwards; about three or four days afterwards.

Q. In connection with what?

A. I took the photostatic copy down to the Territorial Boxing Commission office.

Mr. Clark: This is what, the July 20, 1949, Exhibit B?

Mr. Ellis: 1949.

(Testimony of Herbert Vincent Campos.)

Mr. Clark: To the complaint.

Q. (By Mr. Ellis): I call your attention now, Mr. Campos, to a photostatic copy of the minutes of March 8, 1954, meeting of the Territorial Boxing Commission, Honolulu Armory, 4:30 p.m., and on which is shown to be present Dr. Paul Withington, Chairman; Sherman N. Dowsett, Frank Rania, Arthur H. Stagbar, Adam F. Ornelles, and Robert M. Lee, and among others, Herbert Campos and a long array of other individuals. Opposite Herbert Campos it says:

“Herbert Campos, applicant for manager’s license, after questioning by the Commission, replied that he was applying for license in order to protect his interests in boxer Carl Olson. He presented a photostatic copy of a civil contract between himself and world middleweight champion Carl Olson.” [154]

Mr. Clark: Read the rest of it so long as you are reading it.

Mr. Ellis: “The Commission pointed out that the manager’s application states that a license, after being granted, may be cancelled if not used within six months after its issuance. Mr. Campos stated that he was aware of the ruling.”

Q. Now, I am interested in the first paragraph I read to you. Will you read it to yourself?

A. Bobby Lee had——

Q. I haven’t asked you any questions yet.

Mr. Clark: What is the question?

The Court: He didn’t ask a question, just

(Testimony of Herbert Vincent Campos.)

showed it to him. He is now going to ask him a question.

Q. (By Mr. Ellis): Now, this portion: "He presented a photostatic copy of a civil contract between himself and the world middleweight champion Carl Olson." To what did that refer?

A. That's a photostatic copy I had left in 1949 with Bobby Lee, which he had in the files there.

Q. You got it out of the files?

A. Bobby Lee gave me the photostatic copy which I had left there in 1949.

Q. And you re-presented it to him in 1954, is that right? A. Upstairs in the meeting. [155]

Q. All this time it had been in the files and you re-presented it, is that right?

A. Yes, I took it upstairs. Bobby Lee gave me the photostatic copy from the files downstairs and I went upstairs to the meeting and I presented that to the Boxing Commission.

Q. Now, this 1949 document, July 20, did you file that at any time—did you ever file that in the State of California? A. No, sir.

Q. The Boxing Commission here?

A. No, sir.

Q. Did you file a copy of your memorandum of agreement dated July 14, 1948, as filed in Hawaii, with the California Commission? A. No, sir.

Q. Did you file with the California Commission a copy of your so-called worldwide 1948 civil contract? A. Where, California here?

Q. Yes. A. No, sir.

(Testimony of Herbert Vincent Campos.)

Q. Did you file, ever file any one of those three agreements I have just referred to in the State of New York?

A. I believe I showed my civil contract; I don't know whether I filed it or not in Philadelphia in——

Q. I didn't say Philadelphia, I said New York.

A. New York, no, sir. [156]

Q. The State of New York. A. No, sir.

Q. The answer is no? A. No, sir.

Q. Did you ever file it in the State of Massachusetts? A. No, sir.

Q. In the State of Illinois? A. No, sir.

Q. In the State of Montana?

The Court: Well, any place—did you file it any place?

Mr. Ellis: I want those specific states where Olson fought, your Honor.

The Court: Oh, I am sorry.

Q. (By Mr. Ellis): In the State of Montana?

A. No, sir.

Q. In the State of Oregon? A. No, sir.

Q. Did you render the same duties to Boxer Olson in 1949 that you rendered in 1948 as his manager? A. Yes, sir, I believe I did.

Q. And in 1950 the same as you did in '49 and previous? A. Yes, sir, I believe I did.

Q. And in 1951?

A. Well, up to June 19 of 1951, or whatever date he left.

Q. Did you, Mr. Campos, provide Mr. Olson

(Testimony of Herbert Vincent Campos.)

with any theatrical [157] exhibitions or engagements? A. No, sir.

Q. Any radio or television appearances?

A. No, sir.

Mr. Clark: I think the record should show they didn't have television in the Islands at that time; doesn't the record show that, Mr. Ellis?

Mr. Ellis: Seems to be some argument how advanced the Islands were in the advent of television, but I don't know when it did come.

The Court: Well, do you have some more cross-examination, Mr. Ellis? Do you have some more substantial cross-examination?

Mr. Ellis: Another half day.

The Court: A half day? You're not threatening me with a long trial?

Mr. Ellis: I will try and chop it off as fast as possible.

The Court: Well, you will have some more examination?

Mr. Ellis: A great deal, yes.

The Court: Well then, I think we'd better recess then until tomorrow morning at 10 o'clock.

(Whereupon, an adjournment was taken until 10 a.m. Tuesday, December 13, 1955.)

Morning Session

Tuesday, December 13, 1955, at 10 A.M.

The Clerk: Campos versus Olson, further trial.

Mr. Clark: Ready, your Honor.

Mr. Ellis: Ready, your Honor.

HERBERT VINCENT CAMPOS

resumed the stand.

Cross-Examination

(Resumed)

By Mr. Ellis:

Q. Mr. Campos, so you can orient these questions, following the Robinson fight on October 26, 1950—you remember that fight? A. Yes, sir.

Q. ———did you and Bobo return immediately to the Islands following that fight?

A. Yes, sir.

Q. What did Olson do after the return to the Islands?

A. He wanted to rest for a while until the following year, which was about a month away.

Q. And what did you do?

A. Well, the following January, I believe January the 18th——

Q. I am speaking now immediately following this October 26—did you do anything following October 26 in regard to bouts?

A. No, since he wanted to rest we waited until the following year, January.

Q. Did you provide any trainers for him during the period, [160] or did you still retain the same trainer he had?

A. We had the same trainer, Sharkey Wright.

Q. Sharkey Wright. Was he training during that time, do you know?

A. I believe he was. I mean, not too strong of a training, but regular road work and so forth.

(Testimony of Herbert Vincent Campos.)

Q. In other words, he took his regular workouts and continued training? A. Off and on.

Q. Where was this training taking place?

A. Well, he used to run in the mornings on Kailua; had a race track there. He used to run on the track.

Q. Is that the side of the Island you live on?

A. Yes, sir.

Q. Where was the trainer himself? Was there a gym somewhere?

A. We used to go in the afternoon to a gym in town.

Q. That was in Honolulu? A. Yes, sir.

Q. Did you attend all those gym workouts with him during this period?

A. Yes, sir, during my management of him I attended mostly all of the training—of his training.

Q. Now, I am not interested in the whole period. I am interested right now in the months of October—not October [161] particularly—November and December and January and February.

A. December he didn't train at the gym, I believe, but then in January he began to train again.

Q. He trained in the gym in December?

The Court: January.

The Witness: January.

Q. (By Mr. Ellis): No training at all during December? A. He wanted to rest.

The Court: Well, he just asked whether he did any training.

The Witness: No, sir.

(Testimony of Herbert Vincent Campos.)

Q. (By Mr. Ellis): Now, he started training in January, you say, of 1951?

A. 1951, I believe.

Q. 1951? A. Yes.

Q. Were you there at the gym while he was training? A. Off and on I was at the gym.

Q. You weren't there every day?

A. Off and on. I didn't go every day, but when I could make it.

Q. Would you say you were there every three weeks? A. No, I mean, every other day.

Q. Every other day? A. Yes, sir. [162]

Q. Now, during that time was he sparring?

A. No, he began sparring prior to the Ralph Soto fight.

Q. Now we are talking about January, 1951.

A. No, he wasn't sparring then.

Q. Did you furnish him any sparring mates at all during the early part of 1951?

A. Well, the sparring mates came in when we had a contract for a fight signed, and then arrange to have the sparring partners there.

Q. Up until that time until a fight was signed up, there was no sparring, just preliminary work-outs in the gym? A. That is right.

Q. And maybe running around that race track?

A. That's right.

Q. And all during this time he was still under Sharkey Wright, is that right? A. Yes, sir.

Q. I think you stated yesterday that there were

(Testimony of Herbert Vincent Campos.)

no fights between the period January 1 up to March 1, 1951?

A. That's right, sir; we signed a contract with Leo Leavitt for six months——

Q. I realize that. I haven't asked you that. I will ask it over again: There were no fights between that period of time? A. No, sir. [163]

Q. Between the period March 1, 1951, and June 25, 1951, there were two fights? A. Yes, sir.

Q. Desoto and Marshall?

A. I mean Art Soto.

Q. Who?

A. I believe his name was Art Soto.

Q. Art Soto, and then Marshall, Lloyd Marshall fight? A. That's right.

Q. What was the share of the purse received by Olson from the Art Soto fight? Do you remember?

A. I believe after deducting—his purse was attached, and after deducting the garnishment that he had, he received a total of, I believe, \$46.

Q. And you wired the California Athletic Commission that was the sum total of his purse from the Soto fight, isn't that correct?

A. I believe I contacted the Commission that Olson couldn't pay the amount due Sid Flaherty at that time, I believe; I am not positive.

Q. What was the total purse before the garnishment became effective?

The Court: Before the what?

Mr. Ellis: The garnishment took effect.

(Testimony of Herbert Vincent Campos.)

Q. The purse was garnished by creditors, as I understand it, [164] Mr. Campos. Is that right?

A. Yes, sir.

The Court: Would you fix the date of that?

Mr. Clark: March 20, 1951.

Mr. Ellis: Yes, March 20, 1951.

Q. (By Mr. Ellis): What was the total of Olson's purse before the payment or the deduction before the garnishment?

Mr. Clark: It is in evidence, your Honor.

A. I think we have that in evidence.

Mr. Ellis: You don't remember it?

A. No, sir.

The Court: I don't see it. March, 1951?

Mr. Clark: March 20, 1951.

Mr. Ellis: March 21, 1951, your Honor.

Mr. Clark: Here, your Honor, is the list of the purses under Campos' management.

Q. (By Mr. Ellis): Now, I call your attention to Plaintiff's Exhibit 6, Mr. Campos, and after the date 3/21/51, showing the disbursements to Carl Olson, the figure \$28.36 appears. Is that the net proceeds he received from that?

A. Yes, sir.

Q. From that fight. And the total amount of that garnishment was approximately \$100, wasn't it?

A. I believe so, about \$74 or \$100.

Q. So that what was, in your opinion, then, as you recall [165] it, the total purse proceeds to Olson for the Art Soto fight in 1951?

(Testimony of Herbert Vincent Campos.)

A. It would have been pretty close to a hundred dollars, I believe, one hundred something dollars. I don't know the exact garnishment figure.

Q. It wouldn't have exceeded \$138 or \$140, would it? A. I don't know.

Q. That fight was not a particular success, was it? A. No.

Q. On that same deal, March 21, 1951, you only received \$56.54, is that correct? A. Yes, sir.

Q. If you have any doubts, it is on the Exhibit 6. A. Yes, sir.

Q. That was your one-third of the total purse, is that right? A. Yes, sir.

Q. There was no garnishment against you, was there? A. No, sir.

Q. Now, the second fight in 1951 was the Lloyd Marshall fight, and that was on May 9, 1951. You recollect the——

Mr. Clark: I think May 7 is the correct day. May 7 is the correct date.

Q. (By Mr. Ellis): May 7th instead of 9th. I was taking it from this document. That was the date of the payoff, I guess, then. [166]

I call your attention to the date 5/9, showing the date of the Territory of Hawaii Boxing Commission payoff, Carl Olson \$281.52. Was that his full share of that purse without deductions, two-thirds of the purse?

A. I think this is the final payoff where they paid him after deducting \$100; I am not certain.

(Testimony of Herbert Vincent Campos.)

Q. Now you deducted a hundred dollars from the other one?

A. We have a statement which the Boxing Commission furnishes the manager and fighter on the payoff, what they take off, and then the next check received.

Q. You don't know, then, whether——

A. I am not certain until I see the Boxing Commission——

Mr. Clark: That statement is already in evidence, your Honor, if Mr. Ellis wants it. I have the original back from the reporter in Hawaii.

Mr. Ellis: All right, I would like to see that in the minutes.

Mr. Clark: You want that, Mr. Ellis? You want the statement?

Mr. Ellis: I would like to see the statement, yes.

Mr. Clark: Very well.

Q. (By Mr. Ellis): I call your attention, Mr. Campos, to Plaintiff's Exhibit 6 again, with reference to the receipts by you from the Boxing Commission, and under date of 5/9/51, corresponding to the same date of Olson's disbursal, there is [167] \$237.76; that was your share of that Marshall fight, was it?

A. Yes, sir, that also appears in the statement.

Q. Was there any deduction from yours?

A. It would be shown in the statement of the Boxing Commission.

Mr. Clark: I hand you, Mr. Ellis, the statement

(Testimony of Herbert Vincent Campos.)

of May 9, 1951. the Marshall fight, issued by the Territorial Boxing Commission who made the payments.

Q. (By Mr. Ellis): I call your attention, Mr. Campos, to the Territorial Boxing Commission of Hawaii, boxer-manager statement of earnings just handed me by your attorney for the fight held May 7 in the Territory of Hawaii and dated May 9, as I point out, showing 20 per cent payoff figure of \$535.33. See that figure there? A. Yes, sir.

Q. And showing a deduction of \$100.

A. That is right, that is the payment to Sid Flaherty.

Q. That is a payment that you had the Commission down there deduct? A. That is right.

Q. To be forwarded to Mr. Flaherty, or through the Athletic Commission of California?

A. I believe it was deducted from Olson's share.

Q. Deducted from the gross purse, wasn't it?

A. Then I forwarded the check to Sid Flaherty. [168]

Q. All right, it was deducted from the gross purse, leaving a net purse of \$435.33, is that right?

A. That's right.

Q. Now, what share of that purse were you to get? A. I was to get $33\frac{1}{3}$ per cent.

Q. That is one-third.

A. And Olson, $66\frac{2}{3}$ per cent.

Q. All right. The exhibit you are now looking at, it shows the manager was to receive \$145.11?

A. That's right.

(Testimony of Herbert Vincent Campos.)

Q. That's right. And the boxer was to receive \$290.22? A. Yes, sir.

Q. Making a total of \$435.33?

A. That's right.

Q. I am assuming that \$145.11 is one-third of \$435.33; is that correct? A. Yes, sir.

Mr. Clark: I don't think it is correct, Mr. Ellis.

Mr. Ellis: Let's mathematically divide it by 3 and find out.

Mr. Clark: I think we went into that—pardon me, we went into that.

Mr. Ellis: I am interrogating this witness.

Mr. Clark: And \$100 came off Olson's share.

Mr. Ellis: Just a minute, it didn't. [169]

Mr. Clark: Well——

Mr. Ellis: Not according to this Boxing Commission record you just handed me.

Q. Now, I call your attention to the statement of Exhibit 6 again and I show you on 5/9 that Olson received \$291.52 and not \$290.22; is that correct, according to this?

The Court: Well, if it shows there what it is.

Mr. Ellis: All right.

The Court: Has that been offered in evidence?

Mr. Ellis: Yes, that's right, your Honor, it shows——

Mr. Clark: Not during the trial.

Mr. Ellis: Certain territorial——

The Court: Are you reading from a document that hasn't been identified?

Mr. Ellis: I will offer this document handed to

(Testimony of Herbert Vincent Campos.)
me by plaintiff's counsel as Exhibit A for the defense.

Mr. Clark: No objection.

The Clerk: Defendant's Exhibit A introduced and filed into evidence.

(Whereupon, statement referred to above was received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Ellis): And after deducting the 2 per cent territorial tax and the 1 per cent medical welfare, Exhibit A shows that the boxer's check should be \$291.52; is that [170] right?

A. That is what it shows.

Q. Exhibit 6 under date of 5/9/51 shows that Olson did receive from the Commission \$281.52, is that right?

A. That's right.

Q. The same calculations show you were to receive \$237.76, is that right?

A. Yes, sir.

Q. Exhibit 6 shows you did receive \$237.76, is that correct?

A. Yes, sir.

Q. Now that was the total purse for the second fight in the year 1951?

A. Yes, sir.

Q. It was distributed that way, is that right?

A. Yes.

Q. Now, Mr. Campos, during this period—and I am still speaking of the period January 1, 1951, to June 27, 1951—have you got that period in mind now?

A. Yes, sir.

Q. —what was Olson doing, if anything, to supplement his living?

(Testimony of Herbert Vincent Campos.)

A. Well, I don't know what he was doing. I offered him a job down on the ranch——

Q. Just answer the question. I move that be stricken. What was he doing, if you know, not what you offered him? [171]

A. I don't know. I mean——

Q. You don't know what he was doing?

A. That's right. I know he wasn't working.

Q. You contended that you were his manager then, did you not? A. Yes, sir.

Q. Weren't you interested in knowing what the boy was doing, how he was living?

A. Yes, sir, but he wouldn't come around the ranch very often at that time.

Q. Would you let me hear that again?

A. He wouldn't come around the house very often at that time.

Q. He came around your house often?

The Court: He didn't come around the house often at that time.

Mr. Ellis: He didn't.

Q. Did you go to see him at his house?

A. I went to contact him upon signing the contract with Leo Leavitt. That was January the 18th, I believe, of 1951.

The Court: No, he is asking now for the period March, 1951, to June of 1951.

The Witness: Yes, I seen him quite often.

Q. (By Mr. Ellis): Where did you see him?

A. I went over to see him, and while he was in training—— [172]

(Testimony of Herbert Vincent Campos.)

Q. I asked you if you went to see him at his house? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. How often?

A. Well, I can't say, probably once a week or twice a week; whenever he was in training, practically every day.

Q. As a matter of fact, he was driving a taxicab, wasn't he? A. For a little while there.

Q. You did know he was driving a taxicab?

A. That lasted only for about a week.

Q. As a matter of fact, you know the car he was driving, his taxicab, was repossessed, wasn't it?

A. I don't recall, sir.

Q. Don't recall him telling you that?

A. What is that?

Q. You don't recall him telling you that?

A. No, sir.

Q. Yesterday Mr.—

Mr. Clark: I have no objection.

Q. (By Mr. Ellis): Yesterday, Mr. Campos, you were looking at and we had reference to the ring record magazine, November, 1949. I am now going to call your attention to four issues of the Ring Magazine, November, 1949, the December, 1949, the April, 1950—pardon me, the February, 1950, and the April, 1950, [173] editions of that magazine, and for your convenience I have marked where you may look. I would like you to read the rating—

The Court: Why don't you just save time and

(Testimony of Herbert Vincent Campos.)

read it to him? Ask him the question if you want.

Q. (By Mr. Ellis): November, 1949, Ring Magazine, page 38, ring ratings for the month as of September 15, 1949, as testified by you yesterday, shows Olson as No. 8. That is correct, isn't it?

A. Yes, sir.

Mr. Clark: May I see it?

Mr. Ellis: We offer that—I will offer these as collective exhibits. I think they might as well go in: December, 1949, page 46, ring ratings for the month ending October 15, 1949, middleweight class, 160 pounds, No. 8, Carl Olson. Same position, is that correct?

A. Yes, sir.

Q. February, 1950, which is the annual edition of 1949 of Ring Magazine, and middleweights under the column, page 34, "How boxers of the world are rated by 'The Ring' for 1949." It shows middleweights, world champion Jake LaMotta, and then group 1, 1 to 6, and group 2—that's for the year 1949.

I now ask you, can you tell me whether it is correct that Olson was rated No. 8. Is that correct? Or No. 2 in group 2? [174]

A. No. 2 in group 2.

Q. No. 2 in group 2; and that there are 6 in group 1?

A. Yes, sir.

Q. Right. Now, in April of 1950, the same magazine, ring ratings for the month ending February 15, 1950, middleweights—this is page 36—not exceeding 160 pounds, and I will ask you to look over

(Testimony of Herbert Vincent Campos.)

that column, tell me whether you find Bobo Olson rated at all?

The Court: He is not listed there?

Mr. Ellis: Not listed.

The Court: It doesn't do any good for the witness to read it over and tell me that. If it isn't there, it isn't there.

Mr. Clark: Well, may it be stipulated, Mr. Ellis, that in the issue you just referred to for April of, what is it, 1950?

Mr. Ellis: Yes.

Mr. Clark: April, 1950, it's shown that Dave Sands, whom Olson fought in March down in Australia, is numbered 2.

Mr. Ellis: No. 3, isn't it?

Mr. Clark: No. 2. The champion is Jake LaMotta, Ray Robinson was No. 1, Dave Sands, No. 2, and Dave Sands in that issue, rated No. 2, and Robinson, whom Olson fought under Campos in October of that year is rated No. 1.

Mr. Ellis: The Ring Magazines are being offered for the rating of not the champion, but the rating of "Bobo" Olson. [175] I am introducing them only for that purpose; you may introduce them for any purpose you wish.

Mr. Clark: May it be stipulated that the document shows what we just read.

The Court: Gentlemen, I have spent enough time on this now. Just mark those in evidence. I can read it the same as you can.

Mr. Ellis: That's right.

(Testimony of Herbert Vincent Campos.)

The Clerk: Defendants' Exhibits B-1, B-2, B-3, B-4 introduced and filed into evidence.

(Four issues of Ring Magazine admitted in evidence and marked Defendants' Exhibits B-1, B-2, B-3 and B-4.)

Q. (By Mr. Ellis): As a matter of fact, Mr. Campos, "Bobo" Olson was never rated in the 160-pound middleweight class after April of 1950 in the first ten, isn't that correct?

A. I don't recall, sir.

Q. Up until after he had left the Islands?

A. I don't know.

Q. Now, the Leavitt transaction is what I have in mind now—Leo Leavitt. You testified yesterday that you had an agreement, and it has been introduced in evidence, dated in January of 1951 with Mr. Leavitt, and I believe you said that there was a prior contract or agreement between you and Mr. Leavitt in which he agreed to bring in six fighters, is that correct?

Mr. Clark: Just a minute. May it please your Honor, [176] that is not the evidence; he misstates the record. The witness has not said there was a prior agreement.

The Court: I will sustain the objection. Just ask him the question, Mr. Ellis. Asking the witness what he testified to is objectionable.

Q. (By Mr. Ellis): Did you have any agreement or conference with Mr. Leavitt in 1950, either

(Testimony of Herbert Vincent Campos.)

December or November, in regard to bringing fighters into the Islands as opponents for Bobo Olson?

Mr. Clark: Just a minute. I am going to object on the ground it is complex, calls for an agreement or a conference, two entirely different things. Mr. Ellis knows and we concede there was a conference with Leavitt in 1950 and we have the documentary evidence pertaining to it, all of which was developed on discovery. There was no agreement. And my objection is that the question is compound.

Mr. Ellis: There was a conference in 1950, your Honor, with Mr. Leo Leavitt.

The Court: There was an agreement in January of 1951.

Mr. Clark: Yes, your Honor; it is in evidence.

The Court: Well, let's get on with this, gentlemen. What do you want to bring out, Mr. Ellis?

Mr. Ellis: I expect to prove, your Honor—

The Court: No, some arrangement or agreement or discussion with Leavitt in 1950? [177]

Mr. Ellis: That's right.

The Court: Ask him the question.

Mr. Ellis: I just asked him. I will rephrase it.

Q. Mr. Campos, did you have any discussions with Mr. Leavitt in 1950 in regard to fighters for Olson? A. Yes, sir.

Q. About when did that take place?

A. Right after my return from Australia in 1950. I got back I believe March or April. It was around that time, I believe.

(Testimony of Herbert Vincent Campos.)

Q. Was there anything formalized, written in connection with that?

A. Well, we met down in my home——

The Court: No, was there a writing.

The Witness: There was a writing, but no signed contract, sir.

Q. (By Mr. Ellis): Could you tell me the time that took place—like to have the month or——

A. I believe we have that in evidence, sir.

Q. We haven't got it in evidence, sir.

Mr. Ellis: Have you got that?

Mr. Clark: I am trying to find out.

Your Honor, those are two drafts of documents, one handwritten and one in typewriting with pencil corrections, Exhibits 34 and 35 in the Hawaiian depositions. [178]

Q. (By Mr. Ellis): I will call your attention to two documents which your counsel has just handed me, and so designated in the deposition taken of yours, and ask you whether those are the documents you just referred to?

A. Yes, sir.

Q. Now, look them over and refresh your recollection. Do those documents represent the understanding that you and Mr. Leavitt had at this time?

A. Yes; that was in April, I believe.

Q. I notice they mention five individuals as being prospective opponents.

A. Yes, sir.

Q. Otis Graham, Kid Portuguese, Frank Janiro, Rocky Graziano and Jake LaMotta.

A. That's right.

(Testimony of Herbert Vincent Campos.)

Q. Is that correct? A. Yes, sir.

Q. Was Mr. Leavitt to actually endeavor to secure those fighters for your boy?

A. Yes, sir.

Q. Were those the fighters that he was to procure under the formalized agreement which has been introduced in evidence?

The Court: 11.

Q. (By Mr. Ellis): No. 11, in which you recall he was to produce six fighters within 240 days?

A. I don't believe we mentioned specifically the fighters.

The Court: The question is, were these men Mr. Ellis read to you, were those the men that he was supposed to produce under this agreement of January?

The Witness: It could have been the same; could have been others, your Honor.

The Court: All right.

Q. (By Mr. Ellis): Did Mr. Leavitt contact you in connection with putting up guarantees to bring down any of these fighters to cover the opponents in this agreement of January 19th?

A. No, I don't believe so.

Q. Was the matter of guarantees ever brought to your attention to bring any of these boys down?

A. If it had a guarantee it was stated in the contract, sir.

Q. I mean, did he propose any individual fighter and tell you it would be necessary to have

(Testimony of Herbert Vincent Campos.)

a certain guarantee put up before they would come down? A. No, sir.

Q. It was quite customary, wasn't it, for these mainland boys to demand a big guarantee, or a big cut?

A. That would be up to the promoter to furnish the guarantees.

Q. Where the promoter furnishes the guarantee, where does he reimburse himself, off the top?

A. That would be from the gate.

Q. Off the top, isn't it? [180]

A. What ever profit was left, after the taxes were paid from the bout, and so forth, the rental of the auditorium; whatever was left the promoter had a profit of.

Q. What's left the promoter takes; do you then decide from that what the purse will be for the boxer and manager?

A. Well, you have a statement there, the way to figure out the payments to the fighters——

Q. That doesn't show what I am interested in. What I am trying to find out now, suppose, for instance, that Jake LaMotta is the champion, you try to get him down there, he won't come, will he, unless he gets a big guarantee? Isn't that right?

A. Well, yes.

Q. And he comes out first, doesn't he, and what is left is what is cut up among the rest of the boys and the opponents, and so forth, isn't that right?

A. I believe so.

Q. Yes. So that you can't get first-class fighters

(Testimony of Herbert Vincent Campos.)

to come down to the Islands unless you make it worth their while, isn't that right?

A. Yes, sir.

Q. And Olson, then, and you, as his manager, would have to take what your share of what was left?

A. No, we would go into a contract for a percentage of the gate that has been established prior to the fight time. We go into an agreement by contract. [181]

Q. Who usually gets the big percentage? The big name?

A. Well, it all depends. It seems that the better fighters gets the better amount of the purse.

Q. That's right. So that when you only make \$46.00 or \$146.00 out of a purse you didn't have much of a fighter, did you?

A. It depends, sir.

Q. Not a drawing card, anyway.

A. On the drawing card—on the fighter you have fought.

Q. At the time that you were negotiating with Mr. Leavitt to get these fights, and even after you had that contract with Mr. Leavitt, as a matter of fact Olson was complaining, was he not?

A. I think Olson started to complain on February the 19th, I believe—around February of 1951.

Q. That was at the time you had this arrangement with Mr. Leavitt? A. That's right.

Q. Of January of 1951, is that right?

A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Q. Did Olson at this time ask you to take him to the mainland to arrange fights?

Mr. Clark: At what time, please, your Honor?

Mr. Ellis: I am still in the period January 1st to June 27th of 1951. [182]

Mr. Clark: I see.

The Witness: I believe it was in May that—around May, and that's when he told me that we should try to contact Sid Flaherty again, and then I corresponded with Mr. Flaherty.

Q. (By Mr. Ellis): Didn't Bobo Olson ask you to take him to the mainland where he could get bouts? Didn't he plead with you to take him up there where he could get bouts?

A. No, he wanted to come to the mainland to fight.

Q. Wanted to make some money, didn't he?

A. Wanted to make some money.

Q. He wasn't making any out in the Islands?

A. The first two fights didn't draw too well.

Q. Now, Mr. Campos, let's take the period June 25, 1951, from and after that date. Do you understand what I am talking about?

A. Yes, sir.

Q. Now, we left the period January 1st to June 27th, and now I am taking the period June 25th on for the rest of 1951. Are you clear what period I have in mind?

A. Yes, sir.

Q. What fights, if any, did you arrange, or call "Bobo" Olson during that period?

A. I couldn't arrange for any fights.

(Testimony of Herbert Vincent Campos.)

Q. I said, what fights, if any, if you did any?

Mr. Clark: That's after he left, your Honor. It is [183] conceded——

Mr. Ellis: Never mind. I have given him the period. I don't want you coaching him, counsel.

Mr. Clark: Just a minute, may it please your Honor.

The Court: Just answer the question. Did you arrange any fights from June 25, 1951, until the first of the year, was it?

Mr. Ellis: Yes.

The Court: Until the first of January, 1952. Did you arrange any fights during that time?

The Witness: No, sir; I couldn't, sir.

The Court: Ask the next question.

Q. (By Mr. Ellis): Did you ever notify Olson during that period that he was required to fight for you against any specific party?

A. No, sir; I couldn't sign the——

Q. You say 'No, sir.' That's all I want. You didn't.

Did you ever tender to Olson during that period any fight of a suitable character or otherwise?

A. No, sir.

Q. Now, for the year 1952, I will ask you the same questions.

Mr. Clark: I will object to it, may it please your Honor, on the grounds it is incompetent, irrelevant and immaterial. The evidence shows an utter repudiation by Olson of these contracts as of July 9, 1951. The points covered in the [184] memorandum of au-

(Testimony of Herbert Vincent Campos.)

thorities I have submitted to your Honor and the law is that such a repudiation, going to another manager and repudiating the contract such as that amounts to a prevention of performance which excuses the other party to a contract.

The Court: There isn't any question about it factually, is there? Do we have to take time on that?

Mr. Clark: There is no question.

Mr. Ellis: No question, your Honor, and Mr. Clark is absolutely wrong and I differ 100 per cent with him——

The Court: Gentlemen, you will have an opportunity to argue thoroughly, if you will just get these facts in.

Mr. Ellis: That is what I want, just the facts.

The Court: That's an obvious thing, isn't it? In 1952 you didn't arrange any fights?

The Witness: No, sir.

Q. (By Mr. Ellis): You didn't require Olson to perform for you during 1952? A. No, sir.

Mr. Clark: Just a moment——

Q. (By Mr. Ellis): Did you answer "No, sir"?

Mr. Clark: That is objected to——

The Court: That calls for his conclusion when you put it in that form.

Mr. Ellis: I am now using the exact language of his contract. [185]

The Court: Did you notify Olson any time during 1952 that you had any fight arranged for him?

The Witness: No, sir.

Q. (By Mr. Ellis): Now, Mr. Campos, I call

(Testimony of Herbert Vincent Campos.)

your attention to an agreement dated the 11th day of October, 1949, between Herbert Campos and James A. Spagnola—call your attention to page 4 thereof over the typewritten words “Herbert Campos,” ask you whether that is your signature.

A. Yes, sir.

Q. Was that document the original of the document executed between you and Mr. Spagnola as of that date? A. Yes, sir, I believe so.

Q. Now, will you look at it because it refers to an exhibit attached thereto which I want to examine you on.

You recognize the document? A. Yes, sir.

Mr. Ellis: We offer this document as Defendants' Exhibit next in order.

Mr. Clark: We have no objection to it, your Honor, but may I suggest that the cancellation of that document just about a month later, approved by The Territorial Boxing Commission and signed by Spagnola and Campos, also go in with it; it establishes the period.

Mr. Ellis: I have no objection.

The Clerk: Exhibits C-1 and C-2 introduced and filed. [186]

(Signed agreement and photostatic copy of cancellation admitted in evidence and marked Defendants' Exhibits C-1 and C-2, respectively.)

The Court: What are the dates of those contracts?

(Testimony of Herbert Vincent Campos.)

Q. (By Mr. Ellis): Now, Mr. Campos, I call your attention——

Mr. Clark: His Honor asked a question.

The Court: What is the date of the contract?

Mr. Ellis: The date of the contract, your Honor, is October 11, 1949.

Mr. Clark: And the date of the cancellation, may it please your Honor, is November 29, 1949, and approved by the Territorial Boxing Commission on December 12, 1949. That's Exhibit C-2.

Q. (By Mr. Ellis): Mr. Campos, I call your attention to Exhibit B, which reads as follows: "Statement of account of Carl Olson with Herbert Campos."

Do you remember that statement of account?

A. Yes, sir.

Q. Balance and expenses advanced by Campos to Olson, \$986.17. Those figures are correct? I read them correct? A. Yes.

Q. As of October 11, 1949, then, Olson owed you \$986.17 subject to—appearing below in parentheses—question of \$3,500 advance on account of home still in dispute and not a responsibility of James A. Spagnola. You remember that? [187]

A. Yes.

Q. That exception there. What does that indicate, that Mr. Spagnola was assuming this obligation of \$986.17 to you, or was he going to see that Olson repaid you that under this agreement?

A. It states here "Balance of expenses advanced by Campos to Olson."

(Testimony of Herbert Vincent Campos.)

Q. I know, but the next paragraph indicates that the \$3,500 being in question——

A. That is right.

Q. ——was no obligation of Spagnola.

A. That is right.

Q. I am now asking you, does that mean that it was your intention and his at that time that he had the obligation to see that Olson paid you that \$986.17?

A. No, sir, it was just an accounting of what Olson owed.

Q. I see. That was just an accounting at that time of what Olson owed? A. Yes.

Q. And then I notice below it says “Question of car split 50-50,” and under that \$1,800 previously advanced credits Campos with \$400 over his one-half contribution.”

What does that mean?

A. Well, we had—this was a question about Olson claiming the car should be paid, I should pay half and he pay half, but [188] that was in question at the time.

Q. That was a dispute as to an automobile in which Olson claimed that you were to pay half and he was to pay half?

A. That is what Olson claimed.

Q. And the \$1,800 apparently you had paid?

A. I paid \$1,800.

Q. And this says that that is \$400.00 over your one-half subscription; isn't that what that says?

(Testimony of Herbert Vincent Campos.)

A. That is what it states, but the thing——

Mr. Clark: Over the alleged one-half.

Mr. Ellis: It doesn't say so. It doesn't say "allege." It says "\$1,800 previously advanced credits Campos with \$400 over his one-half contribution."

Mr. Clark: On the assumption that the car question is split 50-50.

Mr. Ellis: I am asking this witness.

Mr. Clark: Very well.

Mr. Ellis: Will you refrain from testifying for the witness?

The Witness: I believe we have an accounting of this in evidence which we made in Honolulu.

Q. (By Mr. Ellis): Never mind what we got in evidence. I am referring you to a document right now, C-1.

A. It shows that the car question was still in question, the purchase of the car. [189]

Q. Was still in question. And you put in \$1,800 which was \$400 over the 50-50 split, is that right?

A. It wasn't split. I mean, the question was that Olson agreed to deposit with me the down payment of one price for the car and I paid for the car \$1,800.

Q. And you got your money back, didn't you, from the Raadik fight or from the Yarosz fight?

A. Olson gave that to me as payment toward the car.

Q. Which fight?

A. The Raadik fight, I believe.

Q. Did you credit that on the \$1,800 you had advanced, or did you——

(Testimony of Herbert Vincent Campos.)

A. That's a down payment that Olson gave for the car was the Raadik purse, or the Raadik fight, and I paid to Schuman Carriage for the car \$1,800.

Q. What was the total purchase price of the car? \$2,800? A. I think we have the figures.

Q. Was it \$2,800? A. Around \$2,800. [190]

* * *

The Court: Mr. Campos, did you make any money or did you lose money in your arrangements with Olson?

The Witness: I lost money.

The Court: You lost money. Doesn't that answer your question?

Mr. Ellis: But it doesn't show how much, and I want to show how much.

The Court: All right. How much did you lose? How much on the debit side of the ledger did you come out? What was your situation financially on the debit or credit side of your arrangement with Olson in June of 1951?

The Witness: I lost money in the boxing game.

The Court: About how much, do you know? Are you able to say approximately?

The Witness: We have the figures there, your Honor. I haven't got it in mind now.

The Court: Some substantial amount?

The Witness: I believe so, your Honor. [193]

Mr. Clark: I will concede, your Honor, and Mr. Ellis I think is familiar with this, as to the amount. We calculated this on the discovery.

(Testimony of Herbert Vincent Campos.)

The Court: Do you know how much it was?

Mr. Clark: Yes, and I was about to state to your Honor, if Mr. Ellis accepts it, and we calculated it in Honolulu, that Mr. Campos was behind approximately \$12,000 as of June, 1951, consisting of personal loans to Olson amounting to around \$7,000 and debit of expenses over Campos' share of the purses for training expenses, for sparring partners and et cetera.

The Court: So there was about \$5,000 aside from the advances for living expenses?

Mr. Clark: About \$5,000 net loss.

The Court: Net loss, without counting——

Mr. Clark: Without counting the advance to living expenses.

The Court: Does that satisfy you?

Mr. Ellis: That is satisfactory.

Mr. Clark: Over and above, may it please your Honor, the amount of Campos' share of the [194] purse.

* * *

Q. (By Mr. Ellis): Mr. Campos, you have spoken about the advances you made to Mr. Olson for personal expenses. You caused to be filed, did you not, a complaint for money in the [197] City and County of San Francisco for those personal advances, did you not? A. Yes, sir.

Q. Now, I call your attention to a photostatic copy of the record in the Superior Court of the State of California in and for the City and County of San Francisco, being action No. 419086 entitled "Her-

(Testimony of Herbert Vincent Campos.)

bert Campos, Plaintiff, versus Carl Olson, also known as Carl "Bobo" Olson, First Doe, Second Doe, Third Doe, and Fourth Doe, Defendants," complaint for money, and that record comprising the complaint, and that record comprising the complaint, a stipulation for entry of judgment, a consent judgment, and a receipt and release.

The Court: Well, do you want to offer it?

Mr. Ellis: I want to offer it as defense exhibit next in order.

Mr. Clark: No objection.

The Court: Any objection?

Mr. Clark: No objection.

The Clerk: Defendant's Exhibit D introduced and filed into evidence.

(Whereupon, Superior Court record No. 419086 was received in evidence and marked Defendant's Exhibit D.)

The Court: Does it show how much is involved?

Mr. Ellis: Yes, it does. [198]

The Court: Just tell me what the amount is.

Mr. Clark: \$9,300.

Mr. Ellis: The complaint was for \$9,342.49, and the consent judgment was for six thousand—stipulation for entry of judgment was \$6,548.69 plus \$79.15, or a total of \$6,627.84.

Mr. Clark: Correct.

Q. (By Mr. Ellis): Who was your attorney? Was it Frederick L. Hewitt, as shown on this record? A. Yes, sir.

(Testimony of Herbert Vincent Campos.)

Mr. Clark: I think the record also shows Mr. Myers was associated in that suit.

Mr. Ellis: Well, the record doesn't show it here on the photostatic copy from the County Clerk's Office.

Mr. Clark: Just read on to the next document, the one after that.

Mr. Ellis: Stipulation for entry of judgment—yes, it does show Ernest O. Meyer.

Mr. Clark: That's right.

Q. (By Mr. Ellis): Will you look at those documents and tell me whether you have ever seen them before? A. I believe I have.

Q. When?

Mr. Clark: Well, which ones, please?

Q. (By Mr. Ellis): This complaint, did you sign the complaint or verify it, rather? Look at it. Make sure, now. [199]

A. I believe I only seen one.

Q. Which one did you see?

A. This complaint that Mr. Hewitt filed.

Mr. Clark: Well, let's see, is it verified?

Q. (By Mr. Ellis): This is verified by Frederick L. Hewitt. So you never saw that complaint, as a matter of fact, did you?

A. I am not sure; I am not certain.

Q. Well, was it sent to you in Honolulu?

The Court: What's the point of it, counsel? What difference does it make? Isn't that a consent judgment?

Mr. Clark: Yes, your Honor.

(Testimony of Herbert Vincent Campos.)

Mr. Ellis: It is a consent judgment, yes, signed by the——

The Court: What is the date of this?

Mr. Ellis: The action was filed July 11, 1952.

The Court: And the consent judgment?

Mr. Ellis: And the stipulation for consent judgment was filed September 30, 1952, and the consent judgment was filed September 30, 1952, the stipulation for consent judgment signed by Frederick L. Hewitt and Carl E. Olson, and the consent judgment is signed by Judge Wollenberg.

Mr. Clark: Judge Wollenberg?

Q. (By Mr. Ellis): Were any of those documents submitted to you before they were filed?

A. I don't believe so. [200]

The Court: You knew about it, that it was being done?

The Witness: Yes, sir.

The Court: The attorneys advised you?

The Witness: Yes, sir.

The Court: What they did was with your approval?

The Witness: They had no power of attorney.

The Court: No, but what they did was with your approval?

The Witness: Yes, sir.

Q. (By Mr. Ellis): Your attorneys had the right to settle this matter for you, did they not?

The Court: Well, he said already what they did was with his approval.

Mr. Ellis: With his approval, the whole thing.

(Testimony of Herbert Vincent Campos.)

Q. You did receive the amount of money for which you settled, is that correct?

A. What is that, sir?

Q. You did receive the amount of money for which you had settled?

A. Yes, sir.

Q. In May of 1951, did you offer Olson for sale?

A. I don't recall, sir.

Q. You don't recall?

A. No, sir.

Q. Did you discuss with a Mr. King the sale of Olson in May, on or about May 8, 1951? [201]

A. Who is that?

Q. Mr. King, K-i-n-g; Mr. Jackie King.

A. I don't think so, sir.

Q. Did you discuss the sale of Olson with a Mr. Spagnola?

A. No, sir, the only one that contacted me was Olson himself.

Q. I will ask you specifically, anyway: Did you discuss the sale of Olson with a Donovan Flint, or J. Donovan Flint, an attorney in Honolulu?

A. No, sir.

Q. Did you discuss the sale of Olson with a Thomas Boyd Miles?

A. No, sir.

Q. Did you discuss with the newspaper reporter in Honolulu the sale of Olson?

A. I don't remember, sir.

Q. I will ask you specifically, then. It may refresh your recollection. With a Mr. Mitsukado?

Mr. Clark: Who?

A. I don't recall, sir.

Q. (By Mr. Ellis): A Red McQueen?

(Testimony of Herbert Vincent Campos.)

A. No, sir.

Q. Or a Joe Anzanita? A. No, sir.

Q. Neither one of them? A. No, sir.

Q. Now, as a matter of fact, Mr. Campos, the complaints of [202] Mr. Olson about your management, as you say, as you mentioned, as your recollect in February of 1951—— A. Yes, sir .

Q. ——and his complaints, were they not, were that you were not getting him remunerative fights, is that correct? A. Yes, sir.

Q. I mean by that profitable fights.

A. I wasn't getting him fights, sir.

Q. He was heavily indebted to you at the time, was he not?

A. Yes, sir, but I didn't bother him about paying me back.

Q. Answer the question; he was heavily indebted to you? A. Yes, sir.

Q. You wanted your money back, though, didn't you? A. No, sir, I didn't ask him for it.

Q. You wanted it back, though, didn't you?

A. Well, I didn't ask him for it.

Q. You wanted it back, though, didn't you?

Mr. Clark: Just a moment. I will object to that upon the grounds it is incompetent, irrelevant and immaterial.

Mr. Ellis: Very important.

Mr. Clark: I don't see that it makes any difference, whether he was dunning Olson for it or not. I guess we would like to have debts owed to us to be paid.

(Testimony of Herbert Vincent Campos.)

Mr. Ellis: I am asking whether he forgave it or wanted it back at that time. He said he didn't ask for it. [203]

Q. (By Mr. Ellis): As a matter of fact, you have testified here that you took a bundle of checks before the Boxing Commission of the Territory of Hawaii in February.

A. That was to show I was——

Q. That was to show what he owes you.

A. That was to show I was taking care of Olson, paid his bills—that I paid his bills, and so forth.

Q. But you didn't want that money back?

A. Well, if he had it, it's a different thing.

Q. You did want it back?

A. I knew he didn't have it.

Q. But you did want it back, did you not?

A. Well, I didn't ask him for it, sir.

Q. And Mr. Olson was complaining to you, was he not, because he wasn't able to make a living, at about that period?

A. That's what he stated, sir.

Q. And he also stated, did he not, that he was in debt to all his creditors, owed money everywhere?

A. That's what he stated.

Q. As a matter of fact, he did, didn't he?

A. Well, I don't know, he never approached me for loans at the time.

Q. Any of his creditors approach you for payment on his accounts?

A. They never did. [204]

Q. As a matter of fact, at that time he was in

(Testimony of Herbert Vincent Campos.)

arrears on his automobile which he was using for a taxicab, wasn't he? A. I don't know, sir.

Q. And also he was clamoring for you to take him to the mainland to get him good fights?

A. That was in May, sir.

Q. Now, as a matter of fact, right at that time you were very unhappy about the whole transaction, weren't you? A. No, sir.

Q. You liked it, did you?

A. Well, yes, since he fought Robinson I think he gained some prestige.

Q. And yet he was not rated?

A. You don't have to be rated; he lasted twelve rounds with Robinson.

Q. But he was knocked out, wasn't he?

A. That was in the twelfth round, wasn't it?

Q. Knocked out, wasn't he? A. Yes, sir.

Q. Now, going down to the meeting of June, 1951, at the Boxing Commission; you recall that?

A. Yes, sir.

Q. Just one or two questions on it. As a matter of fact, you did consent to Olson going to the mainland, did you not?

A. Provided I got my contract. [205]

Q. Answer the question: You did consent, did you not, and then you can explain afterwards; you did consent, did you not?

A. Well, I wouldn't stop him in the way of him making a living.

Q. Well, you did consent; you didn't say he couldn't go, did you? A. No, sir.

(Testimony of Herbert Vincent Campos.)

Q. What did Olson say there at that time; did he say anything at all?

A. He stated that he wanted to come to the mainland to fight for Sid Flaherty.

Q. He wanted to get fights?

A. That's right, under Sid Flaherty.

Q. And you weren't furnishing him fights and he wanted to get them.

A. Yes, sir.

Q. If you recollect, did Olson have any spokesman for him there in that meeting?

A. I think he had Mr. Spagnola there.

Q. Let's go back for a few minutes to that Johnny Duke fight and suspension. You recall that, do you not?

A. Yes, sir.

Q. As a matter of fact, you knew at the time you had Olson and Spagnola in the East that that suspension could have been [206] lifted on the payment of \$2500 to the promoter of the big fight, isn't that right?

A. Yes, sir, the matchmaker wanted \$2500.

Q. Who is the matchmaker?

A. Augie Curtis.

Q. Augie Curtis. He was the man you had used considerably in your fights, too?

A. Yes, sir.

Q. And he wanted \$2500 and he would get the suspension lifted, is that right?

A. That's right.

Q. Why didn't you advance him \$2500 at that time?

A. Well, I figured it was too much money, sir.

(Testimony of Herbert Vincent Campos.)

Q. So that as a result of not lifting that suspension Mr. Olson's trip East and the bouts possible there were forfeited as the result, is that right? A. Yes, sir.

Q. Now, in conclusion I want one answer to this question: Did you ever at any time ask the Territory of Hawaii Boxing Commission to approve the 1949 so-called worldwide agreement, Exhibit B in the complaint in this action? A. No, sir.

Mr. Ellis: That is all.

Redirect Examination

By Mr. Clark:

Q. Mr. Campos, let me show you the papers [207] upon which Mr. Ellis examined you during your cross-examination having to do with some discussions with Mr. Leavitt in March or April of 1950 regarding the getting of bouts. You remember those, do you? A. Yes, sir.

Q. All right. Now, in whose handwriting is the first page I am showing you?

A. This is, I believe, Leo Leavitt's handwriting.

Q. The first part of it? A. Yes, sir.

Q. And then whose handwriting is the second part?

A. This, I believe, is Mr. James Spagnola's handwriting.

Q. How about this second page? Where did that come from?

A. This was given to me by Leavitt, I believe.

(Testimony of Herbert Vincent Campos.)

Q. All right.

Mr. Clark: We will offer these in evidence, Your Honor.

The Court: Any objection?

Mr. Ellis: What would that number be?

The Clerk: Plaintiff's Exhibit 31 introduced and filed into evidence.

(Whereupon sheet 1, a handwritten document, and sheet 2, a rough draft in typewriting, were introduced in evidence and marked Plaintiff's Exhibit No. 31.)

Q. (By Mr. Clark): Mr. Campos, where was the page you first [208] identified as in the handwriting of Leavitt written? A. At my home.

Q. At Lanikai? A. At Lanikai.

Q. And who was there, please?

A. Olson, Sharkey Wright, Spagnola, Leavitt, and myself.

Q. What was the occasion for the meeting at your home at that time?

A. Well, Leavitt wanted to enter into this agreement here with Olson and myself.

Q. Was this immediately after your return from Australia? A. Yes, sir.

Q. From the Sands fight? A. Yes, sir.

The Court: This was in October?

Mr. Clark: No, this is in April 1950.

The Court: April 1950?

Mr. Ellis: Any date on those agreements?

Mr. Clark: April 1950.

(Testimony of Herbert Vincent Campos.)

Q. Now, Mr. Campos, will you please state whether or not any agreement with Leavitt was ever entered into as the result of these negotiations?

A. No, sir.

Q. And why not, please?

A. Because Olson and Sharkey Wright would not agree to go [209] with Leavitt.

Q. Would not agree to go with Leavitt?

A. That's right.

Q. Did anything at all come or result from the negotiations evidenced by these papers which are now marked Plaintiff's Exhibit 31?

A. No, sir.

Mr. Clark: I would like to read just a portion of this to Your Honor, the part in Leavitt's handwriting.

"The offer is \$3000. Guaranty and privilege of 20 per cent of net gate for three fights in Honolulu within 90 days. The choice of fighters are left with the promoter. Three opponents are to be selected for one every 30 days. The opponents all to be selected from the following five fighters, Otis Graham, Kid Portuguese, Frankie Janiro, Rocky Graziano, Jack *LaMont*."

Now, LaMotta was the champion at this time, wasn't he? A. Yes.

Q. Of Olson's class? A. Yes, sir.

Q. These evidenced negotiations with Leavitt which were never entered into as an agreement?

A. Yes, sir.

Q. Now let me further show you a form of con-

(Testimony of Herbert Vincent Campos.)

tract on the [210] form of the Territorial Boxing Commission dated May 28, 1951 between Promotions of Hawaii, Ltd., and signed Carl E. Olson-Herbert Campos, being the copy of the contract for the Chuck Hunter fight to be held on June 19, 1951.

Do you recognize that? A. Yes, sir.

Q. Did you and Olson sign that contract?

A. Yes, sir.

Q. With Promotions of Hawaii?

A. Yes, sir.

Q. Mr. Campos, is that the usual form of contract between manager and fighter on the one side and promoter on the other which was used in Hawaii at that time? A. Yes, sir.

Q. You will note that this calls for Olson to receive 20 per cent of the gross gate.

A. That's right.

Q. All right.

Mr. Clark: We will offer it in evidence, Your Honor, as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 32 introduced and filed into evidence.

(Whereupon official boxing contract, Territorial Boxing Commission, was received in evidence and marked Plaintiff's Exhibit No. 32.)

Q. (By Mr. Clark): Now, in addition, Mr. Campos, through your dealings with promoters which you testified to on your cross-examination, did you, during the time you managed Olson, your-

(Testimony of Herbert Vincent Campos.)
self personally contact any other people with respect to obtaining matches for Olson?

A. Yes, sir.

Q. By other people I mean——

Mr. Ellis: That is beyond the scope of the cross-examination, Your Honor; that was never gone into on direct or cross.

Mr. Clark: Yes, it was, Your Honor.

The Court: What was the question?

(Record read.)

Mr. Clark: Other than promoters. Mr. Ellis attempted to develop that all this man did——

The Court: Overruled.

Mr. Clark: All right.

Q. And among those people did these people include Johnny——

Mr. Ellis: Ask him who he contacted.

Q. (By Mr. Clark): Who did you contact to find fighters?

A. Johnny Artaro, Bill Kyne, Al Weill.

Q. Who is Al Weill?

A. I believe he was a promoter at the time in New York.

Q. Who is he now?

A. He is the present manager of Rocky Marciano, the [212] heavyweight champion.

Q. Who is Ben Norris?

A. Ben Norris, I believe, is the president now of the I.B.C.

(Testimony of Herbert Vincent Campos.)

Q. All right, did you contact him?

A. Yes, sir.

Q. And who else, please?

A. Jack Sullivan, in London.

Q. Who is Jack Sullivan?

A. He is a matchmaker in London, a promoter there.

Q. What negotiations did you have with Sullivan?

A. I wanted to obtain a fight for Olson with Sands in London.

Q. Any others that you remember?

A. There was Al Weill, Johnny Artaro; I believe that is all I remember—Bill Kyne.

Q. Who was Bill Kyne?

A. Bill Kyne, he is the promoter here in San Francisco, I believe, Bay Meadows.

Q. Bay Meadows Race Track. And what negotiations did you have with Mr. Kyne?

A. I was trying to obtain a LaMotta fight, Jacob LaMotta fight through him.

Q. And for when, please?

A. For the year of 1950.

Q. About when in the year of '50? [213]

A. In the early part, I believe, February.

Q. How far did you get with Bill Kyne toward obtaining a match with the champion LaMotta in February of 1950?

A. I think the bout was to be held on Washington's Birthday, I believe at that time.

Q. Was it tentatively arranged for?

(Testimony of Herbert Vincent Campos.)

A. Yes, sir.

Q. You have the correspondence from those people in your files here? A. Yes, sir.

Mr. Clark: Your Honor, I would like to offer two documents which I neglected to put in at the outset of the case. One is a photostatic copy of the minutes of a meeting of the Territorial Boxing Commission held on July 2, 1951 at 4:30 p.m. at the Armory Building in Honolulu, which has been authenticated on discovery. I will ask it be marked Plaintiff's Exhibit next in order.

Mr. Ellis: For what purpose are you introducing that?

Mr. Clark: For the reference to—just a minute, have I got the right one? For the reference to Mr. Campos in those minutes.

Mr. Ellis: May I see that?

Mr. Clark: Yes, indeed.

It is evidence of the action of the Commission, Your Honor, on one of these demands by Campos already in evidence. [214]

The Court: Any objection?

The Clerk: Plaintiff's Exhibit 33 introduced and filed into evidence.

(Whereupon minutes of July 2, 1951, Territorial Boxing Commission, were received in evidence and marked Plaintiff's Exhibit No. 33.)

Mr. Clark: The pertinent portion of this exhibit reads as follows, Your Honor—

The Court: July 2nd, you said?

(Testimony of Herbert Vincent Campos.)

Mr. Clark: July 2, 1951.

“Herbert Campos: The Commission received a letter from Herbert Campos, manager of Boxer Carl Olson, asking their assistance in acquiring his share of Olson’s purse. (Olson left for the mainland without Campos’ knowledge and is scheduled to box Chuck Hunter in San Francisco on July 9th.) The above letter was ordered placed on file.”

And then there is among the exhibits, Your Honor, a letter from the Commission to Campos of July 9, I think it was, in answer to his letter referred to in these minutes.

The Court: That’s right.

Mr. Clark: Now I would also like to offer at this time, may it please Your Honor, the photostatic copy of a letter produced from the files of the Territorial Boxing [215] Commission received by the Commission on March 12, 1951 addressed to the Commissioner, signed Herbert Campos, with respect to the cancellation of the January agreement with Leavitt. It went in as an exhibit.

The Court: With reference to the Leavitt agreement?

Mr. Clark: Cancelling the Leavitt agreement.

The Clerk: Plaintiff’s Exhibit 34 introduced and filed into evidence.

(Whereupon undated letter, Campos to Territorial Boxing Commission, was received in evidence and marked Plaintiff’s Exhibit No. 34.)

(Testimony of Herbert Vincent Campos.)

Mr. Clark: This exhibit reads as follows, Your Honor:

“Territorial Boxing Commission

Honolulu, Hawaii

“Gentlemen:”——

It bears the receipt mark of the Commission as of March 12, 1951.

“I hereby respectfully request that you disaffirm the Memorandum of Agreement between myself as manager of Carl Olson, boxer, and Leo Leavitt as promoter, dated January 19th, 1951, as Mr. Leavitt has failed to fulfill his part of the contract in that 40 days have now gone by and he has failed to arrange for a fight.

“Yours very truly, [216]

“Herbert Campos,”

and the legend underneath that, “Herbert Campos, Manager of Carl Olson.”

That’s all from us, Your Honor, so far as Mr. Campos is concerned.

Recross-Examination

By Mr. Ellis:

Q. Now, with reference to Exhibit 31 about which you have just been interrogated by your counsel, you recollect that? A. Yes, sir.

Q. As a matter of fact, the reason that these documents, Exhibit 31, were never executed or put in final form was because you refused to sign them?

A. No, sir.

(Testimony of Herbert Vincent Campos.)

Q. Didn't they require that you put up guaranties for each of these fighters? A. No, sir.

Q. Didn't they require that you come to the mainland and establish yourself on the mainland in connection with these fighters? A. No, sir.

Q. Your answer is "No, sir" to each one of those questions? A. Yes, sir.

Q. You say there were present at this meeting Mr. Olson—— A. Sharkey Wright. [217]

Q. Sharkey Wright?

A. Spagnola, myself.

Q. Spagnola and yourself?

A. And Leavitt.

Q. And Leavitt. Now, you mentioned some names here, Artaro, Kyne, Weill, Norris and Sullivan. You remember those names?

A. Yes, sir.

Q. Did you produce any fight for Bobo Olson from any of those persons just mentioned?

A. No, sir.

Mr. Ellis: No further questions.

Mr. Clark: That is all from us, Your Honor.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Clark: I think I can read one short deposition before the noon recess.

The Court: All right.

Mr. Clark: May I have the deposition of Mr. Stagbar?

Now, will it be stipulated, Mr. Ellis, that Mr.

Stagbar is in Honolulu and not available as a witness in this case?

Mr. Ellis: That's right.

Mr. Clark: Under the rule.

Mr. Ellis: Stipulated he is in Honolulu and he isn't here.

Mr. Clark: Very well. This is a deposition, Your Honor, [218] of Arthur H. Stagbar, taken in Honolulu on July 6, 1955, before Albert Grain, Official Court Reporter and Notary.

Mr. Ellis: May we have the procedure, Your Honor, established with reference to this? I would like to read from the same deposition, undoubtedly, and following counsel I would like to introduce, so that it is in a sequence, the various portions we each think are material in these various depositions. It would seem to me to be of more help to the Court than it will if it is all scattered all over everywhere.

Mr. Clark: I am going to read this entire deposition. It is quite short. Including Mr. Ellis' cross-examination. I am going to offer that, too.

“DEPOSITION OF ARTHUR H. STAGBAR,

Taken in the law offices of Axel Ornelles, Room 602, Stangenwald Building,”——

The Court: Do you have a copy of these depositions?

Mr. Clark: Oh, I am sorry. I have a copy; does Your Honor want to follow me with it? I haven't, Your Honor, examined the originals for corrections, and I will read from my copy.

(Deposition of Arthur H. Stagbar.)

This deposition was taken in the law offices of——

The Court: Just read the questions and answers.

Mr. Clark: Very well.

“Direct Examination

“By Mr. Clark:

“Q. Your name is Arthur Stagbar? [219]

A. Yes.

Q. And where do you live?

A. 3071 Felix Street, Honolulu.

Q. And what is your occupation?

A. Bowling alley operator.

Q. And for how long have you been in that business?

A. 18 years.

Q. Here in Honolulu? A. Yes.

Q. Are you a member of the Territorial Boxing Commission of Hawaii?

A. I am.

Q. And for how long have you been a member of that Commission?

A. March 19, 1950.

Q. Since March 1950? A. That's right.

Q. In other words, am I correct in stating that you have been a member of the Commission continuously up to the present time?

A. Correct.

Q. Since March of 1950? A. Correct.

Q. Do you know Herbert Campos, the Plaintiff in [220] this case?

A. I do.

Q. For how long have you known Mr. Campos?

A. I would say since I was a member of the Boxing Commission. I knew of Mr. Campos prior to that time but personally know him since being a member of the Commission in March 1950.

(Deposition of Arthur H. Stagbar.)

Q. Since March 1950? A. Yes.

Q. And did you know Carl 'Bobo' Olson, one of the Defendants in this case? A. I do.

Q. And for how long have you known Mr. Olson personally?

A. Well, I would also say that intimately since I became a member of the Commission, but from the very beginning of his boxing career.

Q. In other words, during the entire year of 1951, Mr. Stagbar, you were a member of the Territorial Boxing Commission? A. That's right.

Q. And during the entire year 1951 you were personally acquainted with both Mr. Herbert Campos and Carl 'Bobo' Olson? A. Right. [221]

Q. Do you remember during 1951 any meetings held by the Commission concerning any so-called disagreement between Mr Campos and 'Bobo' Olson? A. Yes, sir, I do.

Q. In that connection, let me show you certain minutes of the Commission during the spring of 1951, the first being the minutes of a regular meeting held on Monday, February 19, 1951, at 4:30 in the afternoon at the National Guard Armory, which indicates that you, Arthur Stagbar, were present, and in which opposite the name 'Carl Olson' it is stated in effect that Olson filed a verbal notice that there was a disagreement between himself and his manager Herbert Campos. The minutes then read:

'A motion by Commissioner Sterling that the Commission accept the notification of protest from Carl Olson, was seconded and carried.

(Deposition of Arthur H. Stagbar.)

‘Carl Olson and Herbert Campos were advised to get together and name an arbitrator satisfactory to both parties, whose decision will be final. In the event [222] they cannot agree on an arbitrator, the Commission will appoint a disinterested person to settle the dispute.’ (Showing a document to the witness) A. Right.

Q. And then let me call your attention to the minutes of the meeting held the following week, on Monday, February 26, 1951, again at 4:30 p.m. at the National Guard Armory. (Showing a document to the witness) Now, can you tell us whether this second meeting I have called your attention to was a regular meeting?

A. Yes, we have them regularly on the same subsequent weeks.

Q. On Monday at that time? A. Yes.

Q. Now, in this second meeting opposite the words ‘Campos-Olson’ appears the following: ‘Mr. Herbert Lee appeared in behalf of Herbert Campos, manager of Carl Olson, in regard to a disagreement between Campos and Olson. He felt that a legitimate and substantial controversy should be established before being submitted for arbitration.

‘Commissioner Flint moved that the Chairman appoint a member of the Commission to consult with all parties concerned and find out the facts in the case. The motion was seconded.

‘Commissioner Stagbar moved to amend the motion to read that the Commission as a whole sit in

(Deposition of Arthur H. Stagbar.)

to hear the case. The amendment was seconded and carried.'

Then at the end of those minutes appears this statement:

'There being no further business the Commission adjourned to go into executive session to discuss the Campos-Olson situation, with all parties concerned in the case. After the discussion, the Commission advised them to get together and try to straighten out the matter among themselves, which was agreeable to all concerned.'

Now, after having had those minutes shown to you, Mr. Stagbar, do you have any independent recollection of any matters which occurred at this executive session in February of 1951?

A. The only thing that I can recall was at the executive session that was held, figuring it [224] would be best to discuss such matters between the individuals in more of a private nature than to have it of a public nature. Let me think a moment. That was the only business of the Commission that it was concerned with, that others weren't concerned with and involved in. It was more or less decided it should be a private nature.

Q. I see. Now, Mr. Stagbar, after having called to your attention the fact that on February 26, 1951, there was an executive session of the Commission concerning this Olson-Campos matter, can you tell us just in substance what happened during that executive session, everything you remember?

(Deposition of Arthur H. Stagbar.)

A. I can't pinpoint the date or the particular executive session to anything that took place other than after seeing what took place, according to the minutes, that the only possibility is that we more or less were concerned whether the Commission should go into it in detail or whether it shouldn't be better left to themselves and the outside parties to settle the matter.

Q. All right. [225]

A. That the Commission should keep its hands clean.

Q. Let me ask you this, Mr. Stagbar: Do you now have any present recollection of any meetings at all—do you remember any meetings during the year 1951 up until, we will say, June 27, of the Commission at which a so-called disagreement between Campos and Olson was discussed? I am asking you apart from these minutes. Do you remember the occasion or the event of any such meetings being held?

A. Well, I don't want to confine it to any particular meeting.

Q. That is exactly why I am framing the question.

A. I do recall this one meeting that Mr. Lee represented Mr. Campos and resulted as the minutes show. And I do recall of another meeting where Olson was present, and I am pretty sure Spagnola and Mr. Campos. Now, I don't recall definitely whether that was at a regular meeting, open meet-

(Deposition of Arthur H. Stagbar.)

ing, or whether it was an executive session. I am pretty sure it was an open meeting.

Q. All right. We don't care about that. And in [226] that connection let me ask you this: As I understand you, you have told us that you do recollect two meetings during the spring of 1951 which concerned Campos and Olson, is that right?

A. That's right.

Q. And a few minutes ago you said that at one of them Lee appeared? A. Yes.

Q. And you pointed to the minutes of the meeting of February 26, 1951, which are sitting in front of you here on the witness chair?

A. That's right.

Q. Is that right? A. Right.

Q. So am I correct in stating that it is the first meeting that you remember at which your recollection is that Mr. Lee appeared?

A. That's right.

Q. All right. Now, confining your answer to that meeting, the first one at which Lee appeared, what is your recollection of what happened at that meeting?

A. Mr. Lee came representing Mr. Campos, and the general gist of the meeting insofar as Mr. Lee [227] was concerned was the Campos contract with Olson, which I believe he inferred was being violated by Olson going to the mainland and fighting under another manager.

Q. In other words, that Olson had threatened to go to the mainland?

(Deposition of Arthur H. Stagbar.)

A. Possibly it was that or that Olson had already left. I can't tie it down to the particular date.

Q. Well, the thing that I am asking you now is the meeting back in February. And I want your recollection as best you can give it to us of the February meeting, if you have any recollection. If you don't, please tell us. Neither I nor Mr. Ellis want you to testify from those minutes. We showed you those simply to orient you as to the date.

A. I really can't state definitely. The only thing I recall is Herbert Lee who at the time was a Senator—and that is the reason that stands out—appearing. If I may, I would like to correct myself to make this statement, that whatever the minutes of the meeting show I would say actually took place for this reason, that we always at subsequent [228] meetings would read the minutes of the previous meetings and approve or disapprove or correct them.

Q. Now, are there any occasions, have there been any occasions while you have been a Commissioner, Mr. Stagbar, in which minutes of prior meetings upon being submitted to the Commission for approval were corrected or changed?

A. In very minor detail. But the gist of the thing is usually approved as stated.

Q. So then are you telling us, is it your testimony that whatever appears in these minutes of February 26, 1951, you think actually took place?

A. Correct.

Q. Is that right?

A. Right.

(Deposition of Arthur H. Stagbar.)

Q. And you are unable to add anything to that at this time from your independent recollection?

A. No, I can't add any more.

Q. You can't add any more? All right. Let us go to this second meeting that you read concerning Olson and Campos and in which you have told us Campos and Olson were both present. Taking June 27, 1951, as your land mark, Mr. Stagbar, [229] which is the date Mr. Ellis and I agreed, which is on or about the date Mr. Ellis and I agreed that Olson left for the mainland, taking that date, can you tell us about how long before that it was that this second meeting took place?

A. Well, I wouldn't know now whether the second meeting would apply so far as my memory is concerned or whether as you stated. The only thing that I do know is of another meeting.

Q. Let us change the words 'second meeting' to 'another meeting' or 'the other meeting.'

A. Yes, at another meeting.

Q. Now, can you tell us about when it was with respect to June 27, 1951, that this other meeting took place?

A. If June 27th is the date Olson left, if that is what you are saying, I would say the other meeting, the one that I am particularly speaking of, took place very shortly before his departure from the islands.

Q. Shortly before June 27th, if that is the date he left, is that right?

A. That's right.

Q. Now, where did this meeting take place?

(Deposition of Arthur H. Stagbar.)

A. It is at the National Guard Armory Boxing [230] Commission office.

Q. Do you remember who was present?

A. As I can recall, Spagnola, Olson and Campos. I don't recall of anybody else being present.

Q. How about the members of the Commission?

A. The members of the Commission. If the minutes show they were all present, then it would mean they had been there.

Q. Well, now, suppose there are no minutes on it, what is your recollection?

A. Then I wouldn't be able to state definitely whether all the Commissioners were there. The only thing is that there were three at least present. It is required as a quorum.

Q. Well, you have no recollection as to what members of the Commission were or were not present, is that right?

A. The only thing I could definitely state is that Dr. Withington, the Chairman, and myself and at least another member. But I don't recall who.

Q. You do distinctly remember that 'Bobo' Olson was there? A. Yes.

Q. Right? [231] A. Campos.

Q. Herbert Campos was there? A. Yes.

Q. And that Spagnola was there?

A. Correct.

Q. Do you remember whether or not anybody else was present? A. No, I don't.

Q. Do you remember whether Tommie Miles was there?

(Deposition of Arthur H. Stagbar.)

A. I don't recall Tommie Miles sitting in on any of the meetings. He may have. But I don't recall.

Q. You don't recall that? Do you recall whether or not Sharkey Wright was present at either of those meetings?

A. I have a slight recollection of Sharkey Wright's coming, sitting in at one of the meetings, maybe more than one, but I can't pinpoint it.

Q. You can't definitely recollect him?

A. No.

Q. All right. Now, Mr. Stagbar, we are concerned only with this other meeting you have told us about in which you placed as having taken place shortly prior to June 27, 1951, if that was the date of Olson's departure. [232] A. Yes.

Q. Or stating it more accurately, you placed it as having taken place shortly before Olson's departure for the mainland in 1951—correct?

A. That's right.

Q. Will you please give us all that you remember of what took place in that meeting?

A. I do recall that there was a complaint but I don't know whether it was by Olson or by Campos, about one or the other not getting his just dues from the other. And, as I sort of recollect, Olson complained that his manager wasn't getting him enough fights. And that he wasn't getting his just financial returns. At that time Campos produced a bunch of checks which included checks that did not pertain to him, anything between him and Olson,

(Deposition of Arthur H. Stagbar.)

and he had among these checks that he had shown some that showed that he had taken care of various bills of Olson's, living expenses such as I recall there was a grocery bill, I believe a doctor's or hospital bill, I don't recall which it was."

Mr. Ellis: May I interrupt a second here, Your Honor?

Mr. Clark: Yes. [233]

Mr. Ellis: And ascertain the procedure? Now coming up I would have an objection; should I make the objection at the time, after it has been read, or before?

Mr. Clark: I suggest you make your objection at the end of the question.

The Court: You waived objection as to form, but you reserved your objection——

Mr. Ellis: I reserved——

Mr. Clark: You reserved your objection.

Mr. Ellis: Commencing at line 16 of this paragraph that counsel is reading, I am going to object to lines 16 through 21 as being a conclusion of this witness.

Mr. Clark: Now, let me see what it says.

The Court: Well, the last line is a conclusion.

Mr. Clark: "I can't pinpoint them as to what the particular checks pertained to. But from that it appeared"——

Oh, I don't care.

The Court: Read the rest of it.

Mr. Clark: All right.

"I can't pinpoint them as to what the particular

(Deposition of Arthur H. Stagbar.)

checks pertained to. But from that it appeared that he had more than taken care of what was due Olson.

“Q. That was your opinion? [234]

“A. That was my opinion.”

The Court: That may go out.

Mr. Clark: I don't care about that.

“Q. Now can you tell us whether this took place at the first meeting?

A. No, I can't.

Q. Or at this other meeting?

A. No, I can't.

Q. You can't take those apart? A. No.

Q. In other words, you can't tell us positively which meeting that took place in, is that right?

A. Let me think a moment. I will see if I can pin it down a little more. As far as I can recall, that was the last meeting.

Q. You think that was the last meeting?

A. Yes, that appears in my mind.

Q. All right. Was anything said at this last meeting about 'Bobo' going to the mainland?

A. There was.

Q. Please tell us what was said about that.

A. As I recall—I don't know who first brought it up—Olson or Campos—but I do recall this specifically, that Campos said he had no [235] objection to 'Bobo' going to the mainland, that everybody is entitled to make a living, and he would permit him to go to the mainland but that he still would retain his managerial rights.

Q. You remember him saying that?

(Deposition of Arthur H. Stagbar.)

A. I do.

Q. Do you remember anything being said about Campos furnishing a trainer on the mainland?

A. That appears vague in my mind. There was a trainer mentioned some way or other but I can't pin it right down as to saying Campos had proposed it or whether someone had asked him and he said he would want it. But there was a trainer mentioned during the course of the meeting.

Q. Was the name of anyone mentioned as trainer at this meeting?

A. No, I don't recall. The only possibility——

Q. I don't want the possibility. I want your recollection.

A. No, I don't recall that.

Q. Now, was any action taken by the Commission at all at this last meeting?

A. Nothing more than to pass it on to the [236] parties interested, themselves settling it under arbitration methods.

Q. Was there any discussion before the Commission at this meeting or any request of the Commission for the canceling of Mr. Campos' contract with Olson?

A. I believe there was by Olson, that the manager wasn't doing his just, giving him his just dues. I don't mean necessarily the financial dues, but he wasn't getting proper results from his manager and that he wanted to disaffirm his contract."

Mr. Ellis: Now, I will object to line 22 through

(Deposition of Arthur H. Stagbar.)

line 3 of page 17 as being again a gratuitous conclusion on the part of this witness Stagbar.

Mr. Clark: All right. Proceeding, your Honor.

The Court: That is from line——

Mr. Clark: The line from where I am reading now.

The Court: The line that you are on may be—to the end of the answer may be stricken.

Mr. Clark: May it please your Honor—very well. Shall I read it for the record?

Mr. Ellis: No, we want to keep it out of the record; it is not properly in the record.

Mr. Clark: Your objection is sustained, and I want it [237] in.

The Court: Read it.

Mr. Clark: “* * * I won’t put it in, I won’t say to put it in those words, but the Commission itself felt that there wasn’t sufficient, that this wasn’t sufficient, and I believe at one point that was brought up at the Commission, that if he wanted to disaffirm he should put it in writing.”

That was brought up at one point, that if he wanted to disaffirm, he should put it in writing. That shouldn’t go out, your Honor, I submit.

Mr. Ellis: Well, he says he feels—he is talking about his feelings.

Mr. Clark: There he is talking about a statement that was brought up, that if Olson wanted to disaffirm the contract, it should be in writing.

Reading on:

“But the Commission itself wasn’t concerned at

(Deposition of Arthur H. Stagbar.)

the time. They didn't feel that he had produced sufficient evidence to warrant disaffirming the contract."

The Court: I will strike out from line 22 to the end of that.

Mr. Clark: Very well.

"Q. Now, did Olson ever make any request of the [238] Commission in writing to disaffirm the contract?

A. Not to my knowledge.

Q. And did the Commission ever take any action at all towards or in connection with cancelling Campos' contract? A. None.

Q. The answer?

A. None, no action by the Commission to disaffirm the contract.

"Mr. Clark: You may cross-examine."

The Court: Do you want to read the cross-examination, or are you satisfied to have counsel read it?

Mr. Clark: I am offering the cross-examination.

The Court: All right.

Mr. Clark: As part of my case.

The Court: Read it.

By Mr. Clark:

"Cross-Examination

"By Mr. Ellis:

"Q. Mr. Stagbar, I note that you don't recall a great deal of what took place at the February 26th, 1951, meeting other than the fact that you re-

(Deposition of Arthur H. Stagbar.)

call distinctly a Herbert Lee as Senator who appeared there.

A. I can't say now if I did state it was at that [239] particular date. I would like to correct that.

Mr. Clark: No, he didn't state that.

The Witness: I can't pinpoint the dates.

Mr. Clark: Suppose we call it the first and the other meeting?

Q. (By Mr. Ellis): The only reason you recall the first meeting is because a Mr. Lee, Senator Lee, appeared? A. That's right.

Q. And you don't recall a great deal of what took place at that meeting?

A. I do not. I don't recall definitely whether he came there in relation to—the only thing I can recall is that he came there as representing Campos. I don't recall whether at that meeting he came there in relation to a disagreement between Campos and the financial returns of 'Bobo's' earnings or whether it was in relation to——

Q. Arbitration?

A. ——arbitration. I don't recall that. I do believe, though, that during the course of his being there at the Commission that arbitration came into the picture. [240]

“Q. So that as far as the first meeting is concerned, you have very little definite recollection?

A. That's right.

Q. Now, as to the other meeting, what causes that to stand out in your mind?

(Deposition of Arthur H. Stagbar.)

A. The checks stand out in my mind.

Q. This bundle of checks?

A. This bundle of checks which Campos produced.

Q. That is the way you identified the other meeting?
A. That's right.

Q. Now, at this other meeting, and we are only talking about the other meeting, it is not the first one—forgot about that—we are both interested in everything that was said and done there at that other meeting, particularly everything that was said or done by the parties, Mr. Olson, Mr. Campos, and now I think you said you thought that Spagnola was there? Am I correct in that?

A. I believe so.

Q. What did he have to say?

A. I know he was at one of the meetings where both parties were present.

Q. But you don't know now whether it was at the [241] other meeting or the first one?

A. No. I know he was there during the course of a discussion about the money due one or the other.

Q. Well, was there any discussion about the money due at this other meeting as distinguished from the first meeting?

A. I believe it was at the second meeting that Spagnola was present.

Q. He was there when the money question was discussed.
A. Yes.

Q. What was said about the money due at that time, if you recall it?

(Deposition of Arthur H. Stagbar.)

A. That Olson's complaint was that he wasn't getting a full return, that he was entitled to by his manager. His manager wasn't supplying him with the proper financial returns as his contract called for.

Q. And he wasn't getting enough fights?

A. That the manager himself was not paying the expenses involved, that he felt he had some more money coming from the manager than he had been given.

Q. In other words, Olson was complaining about not [242] getting enough money from the manager that he was entitled to?

A. That's right. That was part of the complaint, as I recall. And it involved that and not getting enough fights.

Q. Anything else that you can recall that Olson may have said that comes to your mind now after thinking further about it?

A. Olson said very little. I don't recall of anything else he may have mentioned.

Q. Was anyone there representing Olson, speaking for him?

A. As I recall, the only one that spoke in his behalf at the time, if anything, was Spagnola. He was an intermediary, it seemed to me, between Olson and Campos.

Q. What did he say, if you recall?

A. He was sympathetic towards Olson. That much I recall. I don't recall what he may have said

(Deposition of Arthur H. Stagbar.)

except to talk for Olson. Olson may have told him that he present it to the Commission.

Q. Was anything said about the ability of Mr. Campos as a manager by any of the parties there, that you recall?

A. No, I don't recall that being brought up except [243] that he wasn't as a manager fulfilling his part of the bargain, by not getting him more fights.

Mr. Clark: As a what?

The Witness: By not getting him more fights.

Q. (By Mr. Ellis): And I believe you said you don't recall who brought it up, but that somebody brought up the question of going to the mainland, is that right? Am I right in that statement?

A. Yes. It may have been one of the Commissioners or Olson or Campos. I don't know which one. But the subject was brought up.

Q. The subject was brought up? A. Yes.

Q. You don't recall by whom now?

A. No, I don't

Q. Was Mr. Campos asked by the Commission why he had not taken Olson to the mainland, do you remember?

A. I don't recall him being asked that. The only thing I do recall is that in the course of the discussion Campos said he had no objections to Olson going to the mainland, and he [244] felt everybody is entitled to make a living and that Olson, if he was doing it, he wouldn't object to it, but that he was not in any way—he didn't put it in those words

(Deposition of Arthur H. Stagbar.)

—that he was not sidestepping the issues where managerial action came into the picture, that he was still retaining his rights as manager.

Q. And you are quite positive about that recollection?

A. I know during the course of the conversation that came up that he was willing to let Olson go to the mainland, that he wouldn't in any way step in to try to stop him, that he would let him go to earn a living.

Q. Didn't he, Mr. Campos, also say at that other meeting that the only thing he was interested in was getting back all the money Olson owed him as represented by these checks you mentioned?

A. I believe there was some discussion in relation to that, that he felt that Olson did owe him money.

Q. Olson should pay him back?

A. That, well, that he was interested in getting his just returns and he inferred that during [245] the life of his contract he was entitled to his just returns.

Q. Now, you say he inferred. How do you know?

A. Well, what I mean by that is——

Q. I am not interested in what you said but what he said.

A. Well, that is what I mean. I can't tell you the language that was used by various parties because here in the islands the English used by us here may be not as appropriate as it would be on the mainland where you don't have so much pidgin

(Deposition of Arthur H. Stagbar.)

English. We have so many different nationalities to contend with. But during the course of the conversation he inferred he would not step in the way of Olson making a living, going to the mainland to fight, but that he still wanted to retain his rights as the manager during the life of the contract.

Q. That is your belief, that he inferred that?

A. Yes.

Mr. Clark: No, the witness is giving the substance of what he said, isn't that right?

The Witness: Yes. During the course of the discussion that he did state that.

Q. (By Mr. Ellis): He did state that? [246]

"A. He wanted his rights, that he still wanted to retain his rights as his manager.

Q. So you are definite and positive about that?

A. That is the best of my recollection.

Q. The best of your recollection, you are positive that Mr. Campos did so state?

A. That's right.

Mr. Ellis: I think that will be all.

Mr. Clark: That's all from us. Thank you, Mr. Stagbar. Thank you very much."

We will offer the portions read in evidence, your Honor.

The Court: Very well.

Mr. Ellis: No objection. [247]

* * *

The plaintiff will call the defendant Olson. Mr. Olson, will you please take the stand?

CARL OLSON

one of the defendants, called as an adverse witness by the Plaintiff; sworn.

The Clerk: Please state your name to the Court.

The Witness: Carl Olson.

Direct Examination

By Mr. Clark:

Q. Mr. Olson, you're also known as Carl "Bobo" Olson? A. That's right.

Q. What do you live, please?

A. 1710 Crocker Lane.

Q. You're former middleweight champion of the world? A. That's right.

Q. You lost your title last Friday night?

A. Right.

Q. Now, I want to take you back, Mr. Olson, to the year 1949. Do you remember an occasion while you were in Hawaii being managed by Herbert Campos when you matched to fight a boy named Johnny Duke?

A. I do. [248]

Q. The record in the case shows that that fight was scheduled first for October 4, 1949, in Hawaii. Does the date early October accord with your recollection of it? A. No.

Q. At any rate, you were matched to fight Duke?

A. That's right.

Q. Now, am I correct in stating that shortly before the date of the Duke fight you left Hawaii and

(Testimony of Carl Olson.)

came to San Francisco? A. That's right.

Q. About how long before your match was scheduled with Duke was it that you came up here to San Francisco?

A. Well, the match was set and then it was called off. Then after he couldn't—Johnny Duke couldn't make the fight. I came to the mainland.

Q. Didn't you leave before there was any calling off of the fight?

A. Well, Johnny Duke—I think the promoter got a letter, a wire from Johnny Duke's manager stating that he couldn't make the fight.

Q. And was that before or after you left Hawaii? A. Before.

Q. Before? A. That's right.

Q. Who told you that the fight had been called off? A. Mr. Campos did. [249]

Q. Mr. Campos told you?

A. That it was going to be cancelled.

Q. All right. At any rate, you came to San Francisco, is that right? A. That's right.

Q. While you were here in San Francisco did you live with Mr. Flaherty? A. No.

Q. At his home here? A. No, I didn't.

Q. You are sure of that?

A. Not at first. I went to see him as soon as I came onto the mainland, and I asked him that I wanted to fight for him.

Q. You asked him—you told him you wanted to fight for him?

(Testimony of Carl Olson.)

A. Yes, because I wasn't getting any fights and I couldn't take care of my family in the islands.

Q. This was back in 1949? A. Yes.

Q. And at that time you weren't getting any fights in the islands?

A. I was getting them, but not getting paid for it.

Q. You weren't getting paid for it?

A. Well, I was getting paid for the fights, but nothing like I should have.

Q. You didn't think you were getting enough fights, is that [250] right? A. That's right.

Q. Now, in that connection let me show you your ring record, which is in evidence here, which shows that in 1949 in Hawaii you fought Paulie Perkins on January 11th, Antone Raadik on March 15th, Tommy Yarosz on June 3rd, Milo Savage on July 26th, Art Hardy on August 23rd, all of those being before the Duke fight was finally fought.

A. That's right.

Q. Now, don't you remember, Mr. Olson, that Antone Raadik was the first ranking middleweight that you had ever met in your career? Isn't that right? A. That's right.

Q. And don't you remember that the returns from that fight were the most you had ever made up to that time?

A. Well, the money that I was getting, the agreement with my manager, after all of my fights I gave him the check, I signed over the check from the boxing that I got from the fights to Mr. Campos,

(Testimony of Carl Olson.)

that he was to take care of all my bills, and I wouldn't have the worry of taking care of the bills myself.

Q. Mr. Olson, is it your testimony that throughout the time you were managed by Herbert Campos that each and every check for your share of the fight you turned over to him?

A. Not every fight; all the big fights.

Q. All the big fights? [251]

A. Tommy Yarosz, Antone Raadik fight.

Q. Isn't it your recollection that only two checks representing your end of the purse did you ever turn over to Campos, namely——

A. No.

Q. ——the Raadik fight and the Yarosz fight?

A. There were more fights than that, but I don't remember.

Q. You do remember those two?

A. Yes.

Q. Let me take you to the Raadik fight and the matter of turning your check over to Mr. Campos. Did you have an agreement with Mr. Campos at that time to turn your check over to him in return for him making the down payment on a new Buick for you?

A. No. He said that——it was stated in the paper that he was going to buy me a car if I won the fight. A Buick.

Q. The paper said he was going to buy you a Buick, a new Buick, if you won the fight?

A. If I won the fight from Raadik.

Q. Did you get the new Buick?

(Testimony of Carl Olson.)

A. I did; it was with my money.

Q. Well, it was with your share of the Raadik purse, wasn't it? A. That's right.

Q. You didn't pay any more than that on account of the [252] Buick, did you?

A. No, it came out of my fights.

Q. Out of the Raadik purse?

A. The Raadik purse.

Q. All right. Isn't it true that so far as the Yarosz purse was concerned that you and Campos agreed that that check should be applied to your debts which you owed Mr. Campos?

A. Well, all the money that I made from fights I signed, I gave him the checks so he could take care of my bills, my grocery bills, my clothing bills, and after when—before I came to the mainland the last time I found out my bills were all **overdue** and I owed a grocery bill, he didn't take care of that, about five or six hundred dollars, and all my other bills were all overdue.

Q. Let's get into that just a minute. Have you those cancelled checks?

The Court: I don't see the materiality of this, gentlemen.

Mr. Clark: Well, I don't either, your Honor.

The Court: I don't see any point in it.

Mr. Clark: I didn't intend to go into this until the witness made the answer that he did, which is contrary to——

The Court: It is a collateral matter.

(Testimony of Carl Olson.)

Mr. Clark: It is contrary to the evidence in the case, as a matter of fact.

Q. Let's go back to you being up here in September of 1949. [253] Did you at that time, while you were here—first off, what is your recollection as to the approximate time you were here, Mr. Olson? A. I don't remember.

Q. Was it two or three weeks?

A. After the case?

Q. No, we are back in September of 1949.

A. Yes.

Q. On the occasion of your leaving Hawaii and coming to fight under Mr. Flaherty. This is back in September of 1949.

Mr. Ellis: Just a minute. I object to that, coming up to fight with Flaherty; no such evidence in the record.

Mr. Clark: Withdraw that.

Q. We are talking about the occasion, Mr. Olson, of your coming up to San Francisco in late September, 1949. A. Yes.

Q. Remember that? A. Yes.

Q. Now, as a matter of fact, you were suspended by the Territorial Boxing Commission for not meeting Johnny Duke on the date scheduled, weren't you? Isn't that right? A. That is right.

The Court: You are going over the same ground again.

Mr. Clark: I am only trying to establish the time and an event, your Honor, which I am having a little difficulty [254] doing with this witness.

(Testimony of Carl Olson.)

Q. All right. Now, while you were up here on that occasion did you live with Mr. Flaherty at his home here? A. No, I lived in a hotel.

Q. All right.

Mr. Clark: May I have the deposition of Mr. Olson opened?

The Court: This is in September, 1949?

Mr. Clark: 1949, your Honor.

The Court: What difference does it make where he lived?

Mr. Clark: That is the time the Flaherty contract was signed, your Honor.

The Court: I beg pardon?

Mr. Clark: That is the time Mr. Olson signed the Flaherty contract with Mr. Flaherty, although he was already under contract with Campos. It is the intrusion in this case we are suing for.

The Court: What difference does it make where he lived?

Mr. Clark: Well, I think there is some materiality under whose control he was at that time, and he has answered the question and I have a right to impeach him, may it please your Honor.

The Court: Only if it's material. I just don't see the materiality of this line of examination.

Mr. Ellis: Do I understand you are contending now, Mr. Clark, the intrusion was in 1949? [255]

Mr. Clark: I understand that the only contract between Mr. Olson and Flaherty at this time is the September 26th, 1949, contract.

(Testimony of Carl Olson.)

Mr. Ellis: I am interested in your statement that this was the time of the intrusion, in 1949.

Mr. Clark: It's the first one; it certainly is.

The Court: Well, is this on the cause of action against the defendant——

Mr. Clark: Yes, your Honor.

The Court: ——Flaherty? What is the basis of that cause of action?

Mr. Clark: The basis of that cause of action is inducing the breach of the contract with Campos.

The Court: Is that a cause of action?

Mr. Clark: It certainly is, your Honor. The authorities are cited in my trial memorandum.

The Court: In what respect?

Mr. Clark: Why, it is a cause of action in this state and throughout the country, your Honor, for one to, without justification, induce a breach of contract between other people. That's a recognized cause of action throughout the country, and there are at least a dozen California cases recently that support it. And it's a ground for a cause of action for damages against Flaherty.

The Court: You mean if I have a contract with the [256] Emporium to buy merchandise from it over a period of a year, and someone comes along and says to The Emporium, "I can do a better job for you—for the merchandise," that I can be sued?

Mr. Clark: Yes, indeed you can; you certainly can, and the authorities are cited in my memorandum. The only qualification——

(Testimony of Carl Olson.)

The Court: I have never heard of that, Mr. Clark.

Mr. Clark: Your Honor, the only qualification upon that cause of action is that the person inducing the breach must have had knowledge of the prior contract, and the mere entry into a contract with one already under contract to another establishes the cause of action for damages and for, if you please, injunction. The best example is the California Grape Control case cited—it is in the memorandum—decided in 1937 or '8, the first California case on the subject, in which a packing concern had contracts with growers of grapes. And it was alleged that another concern went to those people and induced them to ship the grapes to them in violation of the existing contracts and not to the first contracting party. The court held that that established a cause of action, and this is law throughout the country, your Honor, and in that case, because the breaches were threatened to be continued, an injunction was granted.

Now, if your Honor is interested in hearing the authority on that, they are all in my trial memorandum. [257]

The Court: What becomes of the law of competition?

Mr. Clark: The theory is this: That a person's right in an established contract is paramount to the right of one to go and make a contract with anyone else. It's only when the interference with an existing contract is justified, as in the case of

(Testimony of Carl Olson.)

a boycott in your labor cases where the courts hold that the interest of the working man to better his conditions is paramount to the private right of contract, that such a breach is held not to be actionable. That's the theory of the second cause of action in this case, your Honor.

The Court: What you are talking about is a little different from what I think you're alleging.

Mr. Clark: No, we say in this case that the fact that Olson was under contract to Campos for the term of five years under the first contract and ten under the second, assuming the validity of those contracts, and that Flaherty had knowledge of that fact, and that Flaherty had knowledge of that fact means that when he deliberately signed another contract with the gentleman on the stand he became liable in damages to Campos because he was responsible for inducing. The mere fact that he entered into the contract put it out of Olson's power to perform for Campos.

As I say, your Honor, I am prepared to argue the point, and the authorities are all in the brief. There is no doubt about that being a cause of [258] action.

The Court: Well, of course, you don't mean that that covers the case where I have a contract with you and I decide I am going to quit and make a contract with another man?

Mr. Clark: Oh, no, that is entirely different.

The Court: The other man has a liability——

Mr. Clark: That is an entirely different situa-

(Testimony of Carl Olson.)

tion, your Honor. All I am talking about is that where your Honor has a contract with X, even the cases hold that contract terminable at will you have a property right in it, and if I come along with knowledge of that contract between your Honor and another person to which you have the right of performance and induced the other fellow with no superior justification for it, only by free right of competition, induced the other man to default to your Honor, I am liable to your Honor in damages.

The Court: Of course, that depends upon the status of the first contract, doesn't it?

Mr. Clark: It depends—it has to be a valid contract.

The Court: Well, suppose there is a dispute as to it; suppose one man thinks the contract isn't being performed the way it should.

Mr. Clark: That is a matter of substantive law, your Honor, as to whether or not the contract is valid. Certainly if it is an illegal contract, or if your Honor should find it wasn't being performed, that's naturally a horse of another color. [259]

The Court: It doesn't happen that the man who makes the second contract becomes liable to the party who went into the original contract for damages because of the fact he made a contract with a second party.

Mr. Clark: Well, it does if the first contract in the example I put to your Honor between Judge Goodman and X, as in the Grape Control case to

(Testimony of Carl Olson.)

purchase grapes from X for a period of years or for one season, if that contract is a valid contract, and so held in any ultimate litigation, then my coming along and interfering with that renders me liable for damages.

The Court: But this contract you are referring to, the next year, that wasn't—that was settled, wasn't it?

Mr. Clark: What's that?

The Court: This Flaherty contract.

Mr. Clark: Well, if it was settled, then there is less justification for Mr. Flaherty in 1951 taking Olson back and assuming his management.

The Court: I still don't see any materiality of this 1949 matter. That is why I was asking you these questions.

Mr. Clark: Then I will leave the point.

The Court: Why don't you get right down to what is involved here? Exhibit 10 shows that whatever that was that was settled, the parties entered into some agreement and settled that.

Mr. Clark: Very well. [260]

The Court: October 11, 1950.

Mr. Clark: That's our position, that it was settled. And then, with it being settled, your Honor, a year later, in July of '51, Flaherty again takes over the management of Olson, which is another interference with the existing Campos contracts.

Now, may it please your Honor, I will leave the point so far as the development of any further testimony is concerned, but——

(Testimony of Carl Olson.)

The Court: Let's get on with the testimony. I just don't see the materiality of these matters.

Mr. Clark: Very well, your Honor, but the witness has just made a statement, no matter how remote it is, and I do have the right to call his attention to this deposition on that one proposition, as to whether he and Flaherty—whether he was taken into the Flaherty home when he came up here.

The Court: Well, it's way back in 1949.

Mr. Ellis: Your Honor, just a moment——

Mr. Clark: May it please your Honor, the witness testified under oath in his deposition that he did live with Mr. Flaherty.

The Court: All right, so he did. What difference does it make?

Mr. Clark: I have a right to test his credibility.

The Court: If it is a material matter, yes. It was settled in 1950. Now, we are talking about what happened in 1951 [261] now, aren't we?

Mr. Clark: Very well.

Q. Mr. Olson, was it during this trip up here in 1949 that you signed a contract with Mr. Flaherty?

A. I told Mr. Sid Flaherty when I came up in 1949 that I was through with Mr. Campos and that I wanted to fight for him again. And the only way I could fight for him in San Francisco, California, was for him to sign a contract.

Q. Very well. And the contract you signed in

(Testimony of Carl Olson.)

this contract I now show you marked Plaintiff's Exhibit 9, isn't that right?

The Court: Well, it has already been admitted in evidence.

Mr. Clark: Very well.

The Court: It is admitted that was the contract.

Mr. Clark: On that occasion.

Q. Now, at that time did you have any fights under Mr. Flaherty?

A. Well, after we signed the contract in '49, Mr. Campos sent Mr. Spagnola up here to get me.

Q. Yes.

A. Mr. Spagnola came in to see me when Sid wasn't——

The Court: Well, just answer the question, then you get into another immaterial matter.

Q. (By Mr. Clark): Did you have any fights?

The Court: Did you have any fights under Flaherty?

The Witness: No. [262]

The Court: All right. That answers that. Go ahead.

Q. (By Mr. Clark): And am I correct in stating, Mr. Olson, that two or three weeks later you went back to the Campos management and went with Mr. Spagnola to New York? Is that right?

A. That's right.

Q. All right. Then ultimately you came back to Honolulu and fought Johnny Duke on November 22nd, isn't that right? A. That's right.

(Testimony of Carl Olson.)

Q. It was at that time that the suspension was lifted? A. That's right.

Q. Isn't that right? A. That's right.

Q. All right. Let me take you—well, so as to bring you up to date—that ended '49, and then in 1950 you fought Dave Sands in Australia in the early part of the year, and in October you fought Sugar Ray Robinson in Philadelphia?

A. That's right.

Q. Is that right? A. That's right.

Q. And both of those fights were under Campos management? A. That's right.

Q. Correct. Now, that brings us up, Mr. Olson, to February of 1951. At that time you were back in the islands, weren't you?

A. That's right. [263]

Q. Now, first off I want to show you a contract which is in evidence in this case dated January 19, 1951, signed by you and Leo Leavitt and Herbert Campos, for some fights under Leavitt. You remember that? A. That's right.

Q. All right. Now, at about that time did you start talking to a Mr. Thomas B. Miles about coming back to Mr. Flaherty?

A. Well, when this was signed my manager at that time, Campos, told me he was going to get Jake LaMotta and Rocky Graziano to fight.

Q. I am not concerned about the Leavitt contract; I only call that to your attention so as to fix the time in your mind, Mr. Olson. We are in February, 1951, in Honolulu. You realize that?

(Testimony of Carl Olson.)

A. Yes.

Q. Now, my question is this: At about that time did you start talking to Mr. Miles down in Honolulu about going back to Sid Flaherty?

Mr. Ellis: It hasn't been established yet he knows Mr. Miles.

Q. (By Mr. Clark): Do you know Mr. Miles?

A. Yes, I know Mr. Miles.

Q. You have known him for a long time, haven't you? A. That's right.

Q. All right. And you knew him in February of 1951? [264] A. Oh, yes.

Q. Isn't that right? A. Yes.

Q. Now, my question is: Whether in February, or about that time in 1951, you started talking to Mr. Miles about your coming back to Flaherty?

A. After they didn't get me the fights they promised me to.

Q. Well, was it about that time you started going to Mr. Miles and talking to him about coming back to Flaherty?

A. I am not sure; I think it is.

Q. Well, during the spring of 1951, while you were in Honolulu, did you have conversations with Mr. Miles about your returning to Flaherty?

A. I think I did.

Q. All right. Did you have more than one of those conversations? A. Yes.

Q. All right. At that time did Mr. Miles advance money to you?

A. To come up to the mainland.

(Testimony of Carl Olson.)

Q. No, I don't mean about coming up to the mainland; I mean did he advance you other money?

A. Yes, he did.

Q. Yes. He made loans to you during 1951?

A. Yes. [265]

Q. All right.

Mr. Clark: The witness nods his head affirmatively.

Q. Now, in May of 1951—let me get at it this way, Mr. Olson: You remember, don't you, that along some time in the middle of 1951, which the record shows was in June, there was a meeting in the Territorial Boxing Commission office in which you told the commission you wanted to come up to San Francisco? A. I do.

Q. You remember that, don't you?

A. Yes.

Q. Now, the record shows that that was in June, 1951. My question is this: In May, 1951, did you communicate with Mr. Flaherty about coming up to San Francisco? A. No.

Q. You did not?

A. I don't remember that—I didn't talk to Sid; I talked to Tommy Miles about it.

Q. All right. Now, let me call your attention to your deposition in this case. I will first ask you, Mr. Olson, you remember, don't you, that back in February of this year you gave your deposition?

A. Yes.

Q. In the case then pending in the state court?

A. Yes.

Q. It was the case about these contracts? [266]

(Testimony of Carl Olson.)

A. I do.

Mr. Clark: I may state, your Honor, it is stipulated that the state court depositions may be used in this case.

Q. I want to ask you, Mr. Olson, whether at the time you gave your deposition I asked you the following questions and whether you gave the following answers.

Mr. Ellis: What page is that on will you tell me?

Mr. Clark: Page 59, starting at line 3. No, I am wrong, Mr. Ellis—page 58, line 26.

Q. I want you to listen to these, Mr. Olson.

“Q. Now, during this time, Bobo, were you in correspondence with Mr. Flaherty?

“A. Well, after the Soto fight I was.

“Q. You did—— A. Yes.

“Q. You did write him then?

“A. Yes, I did.

“Q. And just to identify the time we are talking about, your records shows that you fought Soto—— A. Just before Lloyd Marshall——

“Q. Just a minute. You fought Soto on March 20th and you fought Lloyd Marshall on May 7th, and that was the last fight you had in Honolulu?

“A. That’s right.

“Q. In fact, the Lloyd Marshall fight was [267] your last fight under Campos? A. Yes.

“Q. The next one being a fight with Chuck Hunter up here in San Francisco on July 9th?

“A. Yes.

(Testimony of Carl Olson.)

“Q. All right. Now, keeping those dates in mind, Bobo—the March 20th fight with Soto and the May 7th fight with Marshall—when was it that you wrote Flaherty?

“A. I think it was right after the Lloyd Marshall fight, because I was paid—I mean so underpaid for a fighter like Lloyd Marshall at that time, who was a light-heavyweight, and I didn’t get hardly nothing for that fight, and he was a terrific puncher and everything; so I figured that I wanted to come up to the mainland here, and Herbert was tied up with his cattle and everything down there——

“Q. Well, you wrote Mr. Flaherty at that time, then? A. Yes.

“Q. Which would be shortly after May 7th?

“A. Yes.

“Q. So it would be early May, right?

“A. I am not very sure about the date.”

Now, were those questions asked you——

Mr. Clark: And that takes it, your Honor, to page 60, line 2. [268]

Q. Now, do you remember those questions being asked you by me in your deposition, and your giving those answers? A. I do.

Q. Yes. So the fact is, Mr. Olson, that you did—you were in correspondence with Mr. Flaherty at about this time I have called your attention to?

A. After the fights, yes, but I don’t remember the dates.

Q. No, naturally you don’t; naturally.

(Testimony of Carl Olson.)

A. After the Lloyd Marshall fight I did write to him.

Q. Yes. Now, your ring record shows that the Lloyd Marshall fight was on the date in May which we just—your ring record shows the Lloyd Marshall fight was on May 7th of 1951? A. Yes.

Q. That was before this final meeting at the boxing commission, wasn't it?

A. Just before——

Q. In June we are talking about.

A. That's right.

Q. All right. Now, at the time you were corresponding with Mr. Flaherty did he tell you that he had a good contract, good on you in California—that he had a good contract on you in California?

A. I don't remember. He told me that I have to be cleared with the contract I had in Honolulu, with everything, before I came up to him. [269]

Q. Again let me refresh your recollection from your deposition.

Mr. Clark: This, Mr. Ellis, is at page 64.

Mr. Ellis: Before you start that, why don't you finish the rest of that?

Mr. Clark: You can read any portion of this you want. I am going to conduct my examination as I think proper, with his Honor's permission.

Mr. Ellis: All right.

Mr. Clark: Page 64, line 8.

Q. And again let me ask you, Mr. Olson, whether I asked you the following questions and

(Testimony of Carl Olson.)

whether you gave the following answers. You follow me, will you?

Line 8:

“Q. As I understand it, along in May, '51, you had written Flaherty, and he told you to come back to him up here if you were clear of the contract?

“A. Yes.

“Q. And did you have any further correspondence with him at that time?

“A. No, he said he had a contract on me, a California contract, that I had signed, and that was a good contract.”

Now, did you give that answer at that time on your deposition? A. That's right, yes. [270]

Q. Yes. I next want to show you, Mr. Olson, a photostatic copy of a letter which is in the Territorial Boxing Commission file in Hawaii and which Mr. Ellis and myself had a copy made while taking depositions down there. It is dated June 13, 1951, addressed to the Territorial Boxing Commission. It says:

“To: Territorial Boxing Commission.

“From: Carl Olson, Boxer.

“Subject: Managerial incompetence.”

And it is signed, “Sincerely yours, Carl Bobo Olson.”

Now, I want you to look at this letter and tell me whether or not you dictated it.

Before we get to that, I want you to look at the letter and see if you recognize it as a letter you took in to the Commission office on about June 13.

(Testimony of Carl Olson.)

Mr. Clark: You don't have the letter, your Honor; it isn't in evidence yet.

Q. You remember that? A. I do.

Q. Your answer? A. I do.

Q. All right. Now, did someone dictate this for you? A. Yes.

Q. Who? A. I don't remember. [271]

Q. You don't remember? A. No.

Q. Did somebody prepare the letter for you, Bobo? A. Yes, somebody did.

Q. Who was it? A. I don't remember.

Q. Was it Mr. Miles?

A. I don't remember that.

Q. Well, you read it over before you signed it?

A. Yes.

Mr. Clark: We will offer it in evidence, your Honor.

The Court: Any objection?

Mr. Ellis: Let me see it.

The Clerk: Plaintiff's Exhibit 35 introduced and filed into evidence.

(Whereupon, letter of June 13, 1951, Olson to Territorial Boxing Commission, was received in evidence and marked Plaintiff's Exhibit No. 35.)

Mr. Clark: This letter reads as follows, your Honor. Will you follow me on it, please, Mr. Olson?

It is dated June 13, 1951, addressed to the Territorial Boxing Commission from Carl Bobo Olson, Boxer, subject: Managerial incompetence. It bears

(Testimony of Carl Olson.)

the receipt mark of the Territorial Boxing Commission on June 14, 1951.

“Recently my territorial manager, Herbert [272] Campos, signed for me to box Chuck Hunter in Honolulu on June 19, 1951. On the strength of this contract I have been in training for some time at considerable expense to myself.

“On or about June 12, 1951, promoter Lau Ah Chew arbitrarily postponed my match with Hunter to July 3, 1951. The promoter had no legitimate reason for this postponement so he advanced as an excuse that he would be under pressure of business, other than boxing”—underscored—“during the next few days and consequently could not devote full time to the promotion of my bout. He told the Commission that he would be in court on a civil proposition during the time that should have been devoted to the promotion of the Chuck Hunter match. I do not think that this is reason enough for the cancellation of a signed boxing bout. If a promoter cannot devote his full energy to the promotion of a match once it is signed then he should not have entered into the agreement in the first place. The promotion of boxing must be of primary interest to a boxing promoter in order that the business of boxing maintain the success that it once enjoyed in the Territory. [273]

“Hunter is scheduled to box Rocky Graziano before my rescheduled date on July 3, 1951. This bout was announced on the mainland at about the same time my local promoter announced that my

(Testimony of Carl Olson.)

bout with Hunter would be postponed. It is apparent that Hunter was allowed the undue liberty of snubbing his prior contract with me to accept a more lucrative match. My manager made no protest of the promotor's and Hunter's actions thus the Territorial Boxing Commission cannot come to my defense.

“My Territorial manager failed to include training expenses in my original contract for the Hunter bout. This means that all expenses incurred by myself for this bout up to now will be my personal loss. Additional expenses for carrying the bout over to July 3, 1951, will also be my loss because of my Territorial manager's failure to include an expense clause in my new contract.

“My Territorial manager knew that I was scheduled to leave for the mainland to fulfill an engagement with my legal mainland manager, Sid Flaherty, immediately after the bout with Hunter on June 19th. My Territorial manager was [274] aware that rescheduling the Hunter bout would work an undue hardship on me to meet commitments on the mainland.

“In view of the foregoing I maintain that my Territorial manager did not act in good faith in my behalf and I ask that the Commission investigate his actions.

“It is my full intention to carry out the full obligation of the Hunter contract as may be determined through the judicious and unprejudiced action of the Territorial Boxing Commission. How-

(Testimony of Carl Olson.)

ever, I hereby state of my own free will that I will not be available for further matches in the Territory until further notice by myself.

“Sincerely yours,

“CARL BOBO OLSON.”

Q. Now, Mr. Olson, let me call your attention to the part of the letter I just read to you which says that: “My Territorial manager knew that I was scheduled to leave for the mainland to fulfill an engagement with my legal mainland manager, Sid Flaherty, immediately after the bout with Hunter on June 19th. My Territorial manager was aware that rescheduling the Hunter bout would work an undue hardship on me to meet commitments on the mainland.”

Now, at that time when you wrote this letter did you have [275] any commitments arranged under Flaherty on the mainland? A. No.

Q. Well, was that untrue, this statement that is in the letter?

A. About me being, me having another commitment on the mainland, it was untrue.

Q. That was untrue? A. Yes.

Q. Now, at the time you wrote this letter, then——

Mr. Ellis: He didn't say he wrote the letter.

Q. (By Mr. Clark): Well, at the time you signed this letter it wasn't true, then, that your Territorial manager, by whom I suppose you mean Mr. Campos, don't you——

(Testimony of Carl Olson.)

A. That's right.

Q. —knew that you were scheduled to leave for the mainland to fulfill an engagement "with my legal mainland manager, Sid Flaherty"?

Mr. Ellis: The letter speaks for itself.

Q. (By Mr. Clark): That isn't true?

Mr. Ellis: I don't believe this examination is proper; the document speaks for itself.

Mr. Clark: It doesn't speak for itself with respect to things the witness says is not true.

The Court: Well, he said it wasn't true.

Mr. Clark: That's right. [276]

Q. And it also was not true that your Territorial manager, namely, Mr. Campos, was aware that rescheduling the Hunter bout would work an undue hardship on you, is that right?

Mr. Ellis: He didn't say that was not true.

Mr. Clark: I am asking him.

The Witness: That it was?

Q. (By Mr. Clark): Let me ask the question again, please.

You state in the letter as follows—I am quoting from it, Mr. Olson:

"My Territorial manager was aware that rescheduling the Hunter bout would work an undue hardship on me to meet commitments on the mainland."

Was that true?

A. It was true because I told him I was going after the fight.

(Testimony of Carl Olson.)

Q. Well, did you have any commitments on the mainland at the time you signed this letter?

A. No.

Q. Do you know what I mean by commitments?

A. Yes, I know. I had no commitments. I told Mr. Campos I was leaving.

Q. You had no commitments? A. No.

Q. All right. And as I understand the thing, you did not have any arrangement with Mr. Flaherty at this time? [277] A. No.

Q. Is that right? A. Yes.

Q. Now, you attended the meeting in June of the Territorial Boxing Commission that I called your attention to? A. In Honolulu?

Q. Yes. A. Yes.

Q. Was Mr. Miles there with you?

A. He was.

Q. He was? Was he representing you at that time, at that meeting? A. He was with me.

Q. Wasn't he representing you?

A. I don't think so; he was just with me.

Q. Let me again refresh your recollection from your deposition, Mr. Olson. We all realize that you can't keep these things in mind. I want to call your attention to some questions I asked you at page 60, commencing on line 17, at that time, reading:

"Q. And did Spagnola represent you in that, or go with you to the Commission?

"A. Tommie Miles did.

"Q. Tommie Miles? A. Yes. [278]

"Q. Who is Tommie Miles?

"A. Tommie Miles is the former Boxing Com-

(Testimony of Carl Olson.)

missioner. He was with the Boxing Commission—Secretary.”

I notice that the “represent” was in my question that I put to you, so you’re telling us now he did go to the meeting with you, is that right?

A. Yes.

Q. Was he advising you at that time, too?

A. Well, he was. I went to see him about all of this. I told him I was leaving Mr. Campos to go to Mr. Flaherty.

Q. And did Mr. Miles advise you it was best for you to go to Mr. Flaherty?

A. He told me I had to clear up everything with Mr. Campos.

Q. I see. A. I went to the Commission.

Q. All right. Now, the day after this meeting, which I called your attention to, or the following day, did you then leave for the mainland?

Mr. Ellis: Are you referring to June 19th meeting?

Mr. Clark: Yes, or whenever it took place. This witness can’t remember the date.

A. I am not sure. I think so.

Q. Well, was it shortly after that?

A. After the meeting—I mean, after [279] the——

Q. After the meeting? A. Yes.

Q. At any rate, it was between the date of that meeting, whenever it was, and the date you met Chuck Hunter up here in San Francisco, which was July 9, according to your record?

(Testimony of Carl Olson.)

A. Yes.

Q. Between those two dates? A. Yes.

Q. Now, who paid for your transportation up here, Mr. Olson? A. Mr. Miles.

Q. Mr. Miles gave you a ticket?

A. He gave me a ticket.

Q. When you got up here did you report to Mr. Flaherty?

A. I went right up to see Mr. Flaherty.

Q. And you went right to work training in his gym, did you? A. Yes.

Q. And then you met Chuck Hunter up here in San Francisco on July 9? A. That's right.

Q. Now, at any time since then have you signed any further contracts with Mr. Flaherty constituting him your manager?

Mr. Ellis: Where?

Mr. Clark: Any place. Oh, I mean here, place a contract here in California.

A. I guess we have to sign a contract in every fight. [280]

Q. (By Mr. Clark): Well, I am talking about a contract between you and Mr. Flaherty, not between you and some promoter. In other words, let me get at it this way: I have already shown you the contract of September 26th, 1949.

A. Yes.

Q. Which you signed when you came up here during the Duke suspension. You recognize that, don't you? A. Yes.

Q. Now, other than that contract have you ever

(Testimony of Carl Olson.)

signed any further California contracts with Mr. Flaherty? A. I don't remember.

Q. You don't remember them? A. No.

Q. All right. Now, let me take you, Mr. Olson, to some years later, and I will ask you whether you fought a fighter named Jess Turner in Honolulu?

A. Yes, I did.

Q. And your record shows that bout took place on June 15 of 1954. That is what your record shows.

A. Yes.

Q. And that is in evidence. That was the first time you had returned to Honolulu to appear as a boxer since you had left in 1951, wasn't it?

A. That's right.

Q. First fight in Honolulu? [281]

A. Yes.

Q. And am I correct that Mr. Miles promoted that fight?

A. My manager took care of all that; all I did was train for the fight.

Q. You didn't know about that. But am I correct in stating, Mr. Olson, that you waived—you and Flaherty waived your share of the purse in favor of Mr. Miles, who was promoting?

A. All the business that was taken care of my manager did it. I had no——

Q. You didn't know anything about that?

A. No.

Q. Do you have any recollection of not being paid anything for the Turner fight? A. No.

(Testimony of Carl Olson.)

Q. You don't remember one way or the other?

A. No.

Q. All right. Now, you did know that a corporation has been organized, back in the middle of last year, in 1954, called Sid Flaherty Promotional Enterprises. You know that? A. Yes.

Q. Have you ever signed a managerial contract with that corporation for your services?

Mr. Ellis: Managerial contract?

Mr. Clark: Yes.

Mr. Ellis: Managerial? [282]

Mr. Clark: Yes.

Q. Or have you ever signed any contract for services to that company?

A. I don't remember.

Q. You don't remember that? A. No.

Q. Mr. Flaherty would take care of that also, I guess? A. Yes.

Mr. Clark: That's all, your Honor.

Cross-Examination

By Mr. Ellis:

Q. Mr. Olson, continuing with your deposition that Mr. Clark has just read from, and going on from where he left off, page 60, line 3, I'll read for the record:

“Q. What did you say to Mr. Flaherty in that letter?”

Which was referred to by counsel.

Mr. Clark: What page, please?

Mr. Ellis: Page 60. The answer by you:

“Well, I told him I wanted to come back up here

(Testimony of Carl Olson.)

because I owed a lot of bills out there and I wasn't getting no good fights; I wasn't getting paid for fights I was—I wasn't even getting the fights."

You remember that question and that answer?

A. I do. [283]

Q. And that was correct? A. Yes.

Q. And following that:

"Q. I see. A. That I wanted."

You had reference there to the fight you wanted and the compensation or return you wanted, isn't that right? A. That's right.

Q. "Q. And what was his reply to you, Bobo?

"A. Well, he told me that if I was clear and that if I didn't have a contract with Herbert Campos, anybody down at the islands"—

And then you were interrupted.

Now, you remember those questions and that answer? A. I do.

Q. Those answers were correct?

A. That's right.

Q. You understood, Mr. Olson, that at all times unless you were clear with Campos and down in the islands that Mr. Flaherty wanted nothing to do with you? A. Right.

Mr. Ellis: We will have no further questions on cross. We will call him as our own witness in our own case.

The Court: You want to defer that?

Mr. Ellis: Yes, sir. [284]

The Court: Anything else?

(Testimony of Carl Olson.)

Mr. Clark: No, nothing else from us, your Honor.

The Witness: Thank you.

(Witness excused.)

Mr. Clark: We will call Mr. Ernest Meyer.

ERNEST O. MEYER

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name to the Court.

The Witness: Ernest Meyer.

Direct Examination

By Mr. Clark:

Q. Mr. Meyer, you are an attorney-at-law duly licensed to practice before this court and all the courts in the State of California?

A. I am.

Q. Where do you live, please?

A. 1643-18th Avenue, San Francisco.

Q. During the year 1950 were you an associate in the office of Mr. Fred Hewitt? A. I was.

Q. Mr. Hewitt was an attorney here in San Francisco at that time? A. He was.

Q. Now, let me show you an original agreement dated October 11, 1950, signed by Carl Olson as boxer; Herbert [285] Campos, Manager; Sidney Flaherty, Manager, and I will ask you whether or not you were present at the meeting at the office of the State Athletic Commission at which that agreement was signed?

(Testimony of Ernest O. Meyer.)

Mr. Ellis: What is that exhibit number?

The Court: 10.

Mr. Clark: Exhibit 10.

A. Yes, I was.

Q. (By Mr. Clark): Now, who was there, please?

A. There was a woman secretary of the Commission in the office, as I recall, most of the time. Joe Phillips was in the room with Herbert Campos, Bobo Olson and I, Sid Flaherty, and Sharkey Wright, the trainer of Olson, was present, and there was some other member of the Boxing Commission there. I didn't catch his name.

Q. I see. Was the agreement dictated at the meeting at the Commission office after certain negotiations?

A. Yes, it was.

Q. Then it was signed as it appears there?

A. Yes, it was.

Q. All right. Now, after that agreement had been signed, was there any conversation, Mr. Meyer, at which you were present, between you and Mr. Phillips or between Campos and Mr. Phillips regarding his being licensed in California?

Mr. Ellis: Just a moment. This is objected to on [286] the grounds that you have asked about the meeting. The document speaks for itself, and now you are seeking to go into something outside the document that may not have been taken or discussed in the presence of these same parties.

Mr. Clark: May it please your Honor——

(Testimony of Ernest O. Meyer.)

The Court: Well, just a moment. Read the question.

(Last question read.)

The Witness: Yes.

Mr. Ellis: That would be hearsay.

The Court: Yes, I will sustain the objection. It is a conversation between him and your client.

Mr. Clark: Well, in the presence of Olson, who is the defendant.

The Court: You didn't say that in the question.

Mr. Clark: I will make that amendment, your Honor.

Mr. Ellis: Now, it is hearsay, then, as to the defendant Flaherty and the defendant corporation, Sid Flaherty Promotional Enterprises.

Mr. Clark: I don't know whether it is or not.

Q. Was Olson present at this meeting?

A. Yes.

Q. By the way, who is Mr. Phillips?

A. He didn't say there was anybody by the name of Phillips there.

Mr. Clark: I thought he did. [287]

Mr. Ellis: No, he didn't, he said some member of the Commission, he didn't know his name. He didn't get it.

Mr. Clark: Mr. Phillips' name is signed as a witness to that document, and the testimony in this case has been——

Mr. Ellis: The witness told you he didn't know the name. Don't assume facts not in evidence.

(Testimony of Ernest O. Meyer.)

Mr. Clark: I'm not.

Q. Who is Mr. Phillips?

A. Uncle Joe Phillips used to work for the city in the Real Estate Department and he is now a member of the Commission. He was there.

Q. Was he a member of the Commission at that time?

A. Yes, he was.

Q. And was Mr. Phillips present during these negotiations and the preparation of that contract?

A. He was there the entire day.

Q. All right. He was a Commission member?

A. He was.

Q. All right. Now, we will go back to this conversation. Was there any conversation between you and Mr. Phillips or Mr. Campos and Mr. Phillips in the presence of all the persons you have named regarding Campos being licensed in California?

Mr. Ellis: Are you seeking to vary the terms of this instrument by this question? [288]

Mr. Clark: It has nothing to do with this instrument; simply calling his attention to the instrument to locate the event.

A. In the presence of Mr. Flaherty, Mr. Campos—I think Bobo had left at that time. It was after the signing of this agreement Campos said——

Mr. Ellis: Hearsay as to Bobo, then.

The Court: Have you got Olson's permission to testify?

Mr. Clark: May it please your Honor, that raises—just a minute—that raises a question which was argued before Judge Deasy in the State Court

(Testimony of Ernest O. Meyer.)

action where a lawyer represents two people in a given matter and subsequently represents one of them, there is no privilege. Now, if your Honor will take the testimony——

The Court: To be very frank with you I wouldn't pay very much attention to an attorney's testimony who testifies against a former client.

Mr. Clark: Very well, your Honor, but——

The Court: It just doesn't sit right with me.

Mr. Clark: But this man——

The Court: If it is an innocuous matter, it doesn't make any difference.

Mr. Clark: But this man has said, may it please your Honor, that Olson was not there and Flaherty was, just the reverse of the situation I put to him in the question. [289]

The Court: But the document said he was representing Mr. Olson.

Mr. Clark: There is no privilege, and I would like to make my record, your Honor.

The Court: All right.

Mr. Clark: Because I don't think it is anything that is adverse to any defendant in this case.

The Court: If it is not adverse to anyone, maybe we can just state what it is.

Mr. Ellis: I object to any statement made now as far as the defendant Olson is concerned. He stated Olson had left and he was not there; therefore, it would be purely hearsay as far as Olson is concerned, therefore not binding. Furthermore, on the grounds it was privileged, same objection.

(Testimony of Ernest O. Meyer.)

The Court: What is it you want to bring out?

Mr. Clark: I want to bring out that Campos asked to pay the license fee in California and was advised by the Commission that it wasn't necessary, which is evidence which bears upon this technical defense based upon the licensing acts which Mr. Ellis urged to your Honor in his opening statement. That is the only purpose of it.

The Court: That wouldn't be the best evidence of it, would it?

Mr. Clark: It is a Commission [290] member——

The Court: We don't decide what was required by the law by what somebody says about it. Must be some regulation or something.

Mr. Clark: I will develop, your Honor, that——

The Court: What is the value of getting into a conversation between somebody and some member of the Commission? Just like a fellow going to the Income Tax Department and says, "Oh, I don't have to pay this tax, somebody in the Income Tax Department told me I don't have to pay it." You have to have the law and regulations.

Mr. Clark: May it please your Honor, of course, under the regulations, there is no necessity for one being licensed unless the fight is to occur in California.

The Court: You call that to my attention and read the regulations. You don't have to put a witness on the stand to go through all this hulaballoo.

Mr. Clark: But here, your Honor, I can develop

(Testimony of Ernest O. Meyer.)

the fact which I think I am entitled to in this record that Campos offered to pay the license fee for California right there as soon as he got the release from Flaherty, and the Commission member who was in the office refused it. Now, I think I am entitled to that, even in spite of these objections, and I would like it in the record.

Mr. Ellis: He wasn't fighting in California at that time. [291]

Mr. Clark: Obviously he was not.

The Court: You didn't ask him that on the witness stand.

Mr. Clark: No, I didn't. I neglected to.

The Court: What do you need the attorney for in this case? Is that all he is going to testify to?

Mr. Clark: No, that isn't all he is going to testify to, but so long as he is on the stand I thought I would develop it from him instead of being repetitious about it, your Honor, and recalling Mr. Campos and having it duplicated by this man.

The Court: All you want to show by the witness is he offered to pay for the fee?

Mr. Clark: Precisely.

The Court: All right, ask him that question.

Q. (By Mr. Clark): All right, what happened?

A. Mr. Phillips stated it wasn't necessary.

Q. First off, what did Campos say?

A. Campos stated he would like to take out a California license.

Q. All right. What reply did he get?

(Testimony of Ernest O. Meyer.)

A. Phillips stated it wasn't necessary, he could wait until he brought the fighter in and fought in California.

Q. Very well. Now, after this meeting at the Commission, Mr. Meyer, what, if anything, did you do in connection with the settlement evidenced by that agreement? [292]

A. I prepared the papers for Bobo Olson's signature and sent them to Philadelphia for his signature. He was there at the time with Mr. Campos.

Q. You are referring to these papers in the proceeding which is in evidence? A. Yes, sir.

Q. For the vacation of Judge Murphy's order?

A. That's right.

Q. And then what did you do? I don't care about all the steps, Mr. Meyer. Let me ask you this: Did there come a time after October 11 when you called on Mr. Flaherty? A. Yes.

Q. For the purpose of getting the releases signed that are in evidence? A. Yes, I did.

Q. About when was that? And in that connection let me show you one of the releases which you dated October 23, 1950.

A. It was on that day.

Q. All right. And where did you see Mr. Flaherty?

A. I saw Mr. Flaherty in his training quarters in San Francisco.

Q. All right.

A. I think Jones Street, Leavenworth.

Q. Now, let me show you, Mr. Meyer, an orig-

(Testimony of Ernest O. Meyer.)

inal document dated January 29, 1946, signed Maurice Lipton, first party, [293] Sid Flaherty, second party, and I will ask you whether you have ever seen that before?

Mr. Clark: This is a new paper, your Honor.

Mr. Ellis: What is the date of that?

Mr. Clark: January 29, 1946.

Mr. Ellis: Incompetent, irrelevant and immaterial, no possible bearing on this case or the issues in this case.

Mr. Clark: I think it has, your Honor, if I can develop it.

The Court: This is one of the things that was settled, isn't it?

Mr. Clark: That's right, but it has another function, your Honor. Let me get at it this way, if I may have the paper. May I have the copy of the settlement agreement itself, your Honor?

Mr. Ellis: May I make one further observation, your Honor, in connection with——

The Court: Let him ask his question first.

Q. (By Mr. Clark): Mr. Meyer, you will note that in the settlement agreement, Plaintiff's Exhibit 10, Mr. Flaherty is described as the attorney-in-fact for Mr. Moe Lipton.

A. That's right.

Q. You are familiar with that fact, are you?

A. Yes, I am.

Q. Now, at this meeting, or at this time when you went to [294] Mr. Flaherty's place of business

(Testimony of Ernest O. Meyer.)

on October 22, did you ask him for the power of attorney? A. I did.

Q. I show you again the document dated January 29, 1946. I will ask you whether he gave you that in response to your request for his power of attorney from Lipton? A. He did.

Mr. Clark: We will offer it in evidence, your Honor.

Mr. Ellis: Before that is admitted, I object to it; move to strike on this basis, your Honor: Moe Lipton, through counsel here, sought to intervene in this case. That was denied by Judge Carter of this court.

Mr. Clark: Just a minute. You say Moe Lipton through counsel?

Mr. Ellis: Yes.

Mr. Clark: Through me?

Mr. Ellis. I didn't say through you.

Mr. Clark: He said through counsel here.

Mr. Ellis: Yes, in this Judge Carter's court. I didn't say you. It is something that doesn't refer to you. You didn't appear for him.

Mr. Clark: Let's not have any misunderstanding about it. That was denied. I opposed that, as you did.

Mr. Ellis: We both opposed it vehemently, and that was denied. Now, here is the back door entry for the Moe Lipton papers which are, as I objected to them in the first instance when the matter of setting aside the approval in the court case here in the Superior Court in the City and County of

(Testimony of Ernest O. Meyer.)

San Francisco, incompetent, irrelevant and immaterial, and remote and not a part of the issues in this case. And I object on the same basis that this man was refused permission to intervene because he was not in any way connected with the issues, and we both argued to that extent, and now it is being introduced as a part of this case.

The Court: I don't see any relevancy.

Mr. Clark: May it please your Honor——

The Court: I don't see any relevancy with respect to the cause of action for damages for breach of contract.

Mr. Clark: On the very point, may it please your Honor, that we discussed earlier this afternoon, namely, the cause of action for unjustifiable interference with an existing contract, it's necessary for me to prove that there's no possible justification. Therefore, I rely for **lack of justification** in Mr. Flaherty's case upon the settlement agreement. As your Honor pointed out, it has been settled, but I do want to have all the elements of that settlement agreement so far as its validity is concerned in this record.

The Court: I don't see why. I am not trying that issue here. [296]

Mr. Clark: Well, you are going to——

The Court: It is enough to try this case of Campos against Olson without trying it to decide the validity of these things that took place in '46 to '50.

Mr. Clark: May it please your Honor, you are

(Testimony of Ernest O. Meyer.)

going to be faced with the issue and you will have to decide as to whether or not there was an unjustifiable interference with Campos' contract. That is an issue in this case.

The Court: Flaherty may have been the meanest man in the world in 1946 and done all kinds of dirt to these people, but what has that got to do with this case?

Mr. Clark: No, that's not the point, because if Mr. Flaherty did have rights under the Lipton contract in the document I just offered to your Honor, then his interference was proper, was not unjustified. He has a right to further those.

The Court: But you yourself have offered in evidence, and it has been admitted, the agreements which settled all these controversies. What is the good of going back all over it again?

Mr. Clark: The reason for this offer is to establish, to support the validity of that settlement.

The Court: Nobody has questioned it yet.

Mr. Clark: Well, they will.

The Court: It has been admitted in evidence, it has [297] been admitted that Flaherty, Campos and Olson settled whatever claims they had against one another by paying a certain sum of money in October, 1950, and there were releases. That was done. That is a finished thing.

Mr. Clark: Well, if that's your Honor's view——

The Court: There is no dispute about it yet.

Mr. Clark: I am sure there will be.

(Testimony of Ernest O. Meyer.)

The Court: Nobody has disputed it.

Mr. Ellis: That will be, your Honor.

Mr. Clark: There will be a dispute about it, and I am making my record, Your Honor.

Mr. Ellis: Still has nothing to do with the issues in this case in 1951.

Mr. Clark: After all, your Honor, Mr. Ellis and I have lived with this case at least since last July.

The Court: I am not going to live with it as long as you have. We want to get right down as speedily as the interests of justice will permit, because we have other business in the courts, to the main issue of the case. Now, if you have to do something in rebuttal later on, maybe you will have to do it, but at the moment you have made a prima facie showing that agreements were executed and these matters were all terminated and settled in 1950. What is it you want to prove now?

Mr. Clark: I thought, your Honor, by this witness I [298] could establish the existence of the document referred to as a power of attorney, which is one of the essential agreements of the settlement. Now, as I explained to your Honor, the settlement is vital to our case so far as the second cause of action is concerned, because it removes any possible justification for Mr. Flaherty having taken Olson over in June of 1951. It's part of my case, your Honor.

The Court: I don't see any particular substance to that as yet. The main question is, what was the

(Testimony of Ernest O. Meyer.)

relation of the parties, of Campos to Olson, in June of 1951 when he went over and made arrangements with Flaherty. That's the main question.

Mr. Clark: I concede, your Honor, it is a very important question.

The Court: I think it's the main question.

Mr. Clark: But there is also another question, that is, who, if anyone, caused the breach between them and who interfered with the existing Campos contracts. I have a cause of action on that, your Honor, and if you will read my memorandum of authorities I think you will agree with me.

The Court: Your cause of action depends on the relationship between Campos and Olson at that time.

Mr. Clark: Do I understand the offer is refused?

The Court: Well, I will sustain the objection to that particular offer. [299]

* * *

Mr. Clark: We will offer it as plaintiff's exhibit for identification next in order.

The Clerk: Plaintiff's Exhibit 36 marked for identification.

(Whereupon, agreement of 1/29/46, between Maurice Lipton and Sid Flaherty, was marked Plaintiff's Exhibit No. 36 for identification.)

Mr. Clark: May it please, your Honor, I want to read [300] the deposition of Leon K. Sterling,

Jr., a member of the Territorial Boxing Commission, taken in Honolulu on July 6th of this year, and I presume, Mr. Ellis, we have the same stipulation that Mr. Sterling is in Honolulu?

Mr. Ellis: That's right.

Mr. Clark: And not available as a witness.

DEPOSITION OF LEON K. STERLING, JR.

"Direct Examination

"By Mr. Clark:

"Q. Your name is Leon K. Sterling, Jr.?

A. Yes, it is.

Q. And where do you live, please, Mr. Sterling?

A. 1773 Kaioo Drive. That is K-a-i-o-o.

Q. Here in Honolulu? A. Yes.

Q. And what is your business?

A. Sales manager for Aloha Motors.

Q. And for how long have you held that position? A. Since September of 1954.

Q. Now, during the year 1951 were you a member of the Territorial Boxing Commission of Hawaii? A. Yes, I was.

Q. And for how long before that had you been a member of the Commission?

A. Since 1948, I believe. [301]

Q. Since '48? A. Yes.

Q. And are you now a member of the Commission? A. No, sir, I am not.

Q. Well, when did you cease being a member of the Territorial Boxing Commission, just approxi-

(Deposition of Leon K. Sterling, Jr.)

mately? A. Yes, early part of 1953.

Q. So that am I correct in stating that you were a member of the Territorial Boxing Commission from some time in the year 1948 up until some time in 1953? A. That's right.

Q. And you were, of course, a member of the Commission during the entire year 1951?

A. Yes, I was.

Q. Do you know Herbert Campos, the plaintiff in this case? A. Yes, I do.

Q. And for how long have you known Mr. Campos? A. 1940.

Q. Since about 1950?

A. Since about 1940.

Q. And, at any rate, you knew Mr. Campos during the year 1951? [302]

A. Yes, I did.

Q. And do you know Carl 'Bobo' Olson, one of defendants in this case?

A. Yes, I do.

Q. And for how long have you known Mr. Olson? A. Since about 1948.

Q. Since about 1948? A. Yes.

Q. And you knew Mr. Olson during the entire year 1951? A. Yes, I did.

Q. Now, do you remember any meetings which were held by the Commission during the year 1951, between the first of the year and up until July 1st, we will say, at which Mr. Olson and Mr. Campos were present regarding any disagreement between them? A. I recall two meetings.

(Deposition of Leon K. Sterling, Jr.)

Q. You recall two meetings? A. Yes.

Q. Now, do these two meetings stand out pretty clearly in your mind?

A. Yes, after referring to the minutes.

Q. After reviewing the minutes which I just showed you a few minutes ago in discussing with you [303] and prior to your being sworn, is that right? A. Yes, that's right.

Q. And, Mr. Sterling, do you remember the events of there being two meetings of the kind I have just described? A. Yes, I do.

Q. Now, let me show you the minutes of the Territorial Boxing Commission for a meeting held on Monday, February 26, 1951, at 4:30 p.m., in the National Guard Armory, in which it is stated that Mr. Olson is present and that Mr. Lee appeared on behalf of Herbert Campos in regard to a disagreement. And then the minutes go on to say that the Commission told the parties—the minutes show that the Commission adopted a resolution to hear the facts of the case. And which minutes also state at the bottom of the second page opposite the words 'Executive Session' that,

'There being no further business the Commission adjourned to go into executive session to discuss the Campos-Olson situation with all parties concerned. After the discussnon the Commission advised them to get together and try to straighten out the [304] matter among themselves, which was agreeable to all concerned.'

Do you remember that executive session having taken place?

(Deposition of Leon K. Sterling, Jr.)

A. I remember it taking place.

Q. Would you say that the first meeting you recollect or which you have told us you recollect concerning any disagreement between Olson and Campos took place on February 26, 1951? In other words, is that the first meeting you remember?

A. Yes, that's right.

Q. You think that is right? A. Yes.

Q. Now, can you tell us in substance as nearly as you can recollect from your own memory what took place at this executive session on February 26, 1951?

A. I believe it was about the matter of getting fights.

Q. About a matter of getting fights?

A. For 'Bobo.'

Q. And what, if anything, just in substance was said on that?

A. I don't recall too clearly. [305]

Q. Was there any complaint made on behalf of 'Bobo' that he wasn't getting enough fights?

A. I believe that is what it was.

Q. And do you remember what anybody said on behalf of Campos?

A. This is going back in memory now, but Mr. Lee tried to prove that the manager was trying to get fights for him.

Q. Was trying to get fights for him?

A. Yes.

Q. Now, at that time do you remember any checks being produced on behalf of Campos?

(Deposition of Leon K. Sterling, Jr.)

A. I believe it was at that time that checks were produced to show that the manager Campos had incurred certain expenses in taking care of 'Bobo.'

Q. And do you remember whether those checks were submitted to the Commission?

A. I think they were passed around.

Q. Passed around?

A. But I don't think any are a part of the Commission records.

Q. I understand. But do you think it was passed to the Commission and that the Commission looked at them? [306]

A. Yes, I remember vaguely, I think, there was one check on an automobile and things like that.

Q. All right, now, what was the result of that meeting? What happened?

A. I believe we told them to try to get together.

Q. Try to get together? A. Yes.

Q. All right. Now, let us go to this meeting that you remember. If I should tell you that the record in this case shows that Olson left Hawaii for the mainland about June 27th of 1951, could you place the approximate time this next meeting took place before the Commission that you remember?

A. Yes. It wasn't too many weeks prior to that date of Olson leaving.

Q. And where was that meeting held?

A. That was held in the Armory.

Q. The Armory was then the regular meeting place of the Commission?

(Deposition of Leon K. Sterling, Jr.)

A. Yes, the Boxing Commission.

Q. Do you remember who was present from the members of the Commission—do you remember who was present aside from the members of the [307] Commission? Just give us your recollection now.

A. Yes, 'Bobo' was there.

Q. 'Bobo' Olson?

A. So was Herbert Campos.

Q. Herbert Campos?

A. And I think Tommie Miles was there.

Q. You think that Tommie Miles was there?

A. Yes.

Q. Do you remember Sharkey Wright being there?

A. I don't recall Sharkey Wright being there. He may or may not have been.

Q. You don't have any recollection on Wright?

A. No, sir.

Q. Do you have a distinct recollection of Tommie Miles being there?

A. Yes, I believe Tommie Miles was there.

Q. Will you please tell us in substance what was discussed at this meeting, that is, who said what, and what the things which were discussed at the meeting were?

A. A matter of getting fights for 'Bobo.'

Q. The matter of getting fights for 'Bobo'?

A. Yes.

Q. And what was said about that, please, [308] Mr. Sterling, as nearly as you can recollect?

A. That 'Bobo' hadn't been working and hadn't

(Deposition of Leon K. Sterling, Jr.)

had any fights. I believe the manager tried to show us then that he tried to get fights for Mr. Olson.

Q. Was anything said in that meeting about the Chuck Hunter fight having been cancelled?

A. I believe that was brought.

Q. You think that was brought up?

A. Yes.

Q. All right. Was anything said at that meeting about 'Bobo' going to the mainland?

A. Yes.

Q. What was said about that?

A. I am going back in memory now.

Q. I want your memory.

A. Yes. Exactly who said it, I don't know, but 'Bobo' said if he could go to the coast he could get some fights there. I don't recall exactly who said it. But if 'Bobo' went to the mainland he could get fights there.

Q. That is the impression you got of what was said on behalf of 'Bobo,' is that right?

A. Yes.

Q. And do you remember what Campos replied to [309] that?

A. I believe Mr. Campos said that 'Bobo' could go.

Q. And did Mr. Campos say anything about getting a trainer for 'Bobo' up there?

A. My memory is that Mr. Campos said that he could get a trainer there.

Mr. Ellis: Just a minute, Mr. Clark. I want to

(Deposition of Leon K. Sterling, Jr.)

get his recollection without your——

Q. (By Mr. Clark): Very well, just give up everything that you remember as to what happened, Mr. Sterling, on this subject at that time.

A. Well, some said—exactly who said it I don't remember—that if 'Bobo' went to the mainland he could get fights and be kept busy, in other words. It was all right with Campos. And I do believe that Campos said he would get him a trainer up there.

Q. Do you remember whether or not Mr. Flaherty's name was mentioned in the meeting?

A. I don't recall his name being mentioned?

Q. Have you given us in substance all you remember of that meeting now, Mr. Sterling?

A. Yes.

Q. Let me ask you this: Was there any discussion whatsoever at that meeting concerning the [310] Commission cancelling Mr. Campos' contract?

A. No, sir.

Q. Your answer? A. No, sir.

Q. There was not? A. No.

Q. Was there any action at all taken by the Commission on anything at that meeting?

A. Not that I recall.

Mr. Clark: You may cross-examine.

(Deposition of Leon K. Sterling, Jr.)

Cross-Examination

By Mr. Ellis:

Q. Mr. Sterling, you have placed this second meeting that you are talking about with the Commission, you said, not too many weeks prior to June 27th?

A. Was that the date that Olson left?

Mr. Clark: Well, we will accept that.

Mr. Ellis: We are accepting that date, that on or about June 27, '51, he left for the mainland.

Mr. Clark: Will you please answer? Mr. Grain can't get your nod.

The Witness: What was your question?

Q. (By Mr. Ellis): You said, not too many weeks. [311] I would like to get it tied down. Would you say it was four, five weeks before that or two weeks or what?

Mr. Clark: You mean before Olson left?

Mr. Ellis: He left on the 27th.

A. I would say it was between two and three weeks before that, yes.

Q. (By Mr. Ellis): And you are quite positive, are you, that all the Commissioners were present?

A. I don't know if Mr. Flint was there. I can't place him. I know Mr. Dowsett and Mr. Stagbar were there. I am quite sure they were, and Mr. Withington.

Q. And you are not sure whether Flint was there?

(Deposition of Leon K. Sterling, Jr.)

A. I am not too sure whether Flint was there or not. One of them might have been missing, I'm not sure which one. It was either Flint or Dowsett.

Mr. Clark: Either Flint or Dowsett?

The Witness: Yes. I am not too sure on that.

Q. In other words, they could have all been present?
A. Yes. [312]

Q. And you are positive that Mr. Campos was there and Mr. Olson was there?
A. Yes.

Q. Anyone representing Olson there besides, any attorney representing him or anyone else?

A. I don't place Herbert Lee at that meeting.

Q. You don't place his name?
A. No, sir.

Q. And so far as you know, there was no one there representing Mr. Campos? Campos and Olson were there by themselves?

Mr. Clark: That is not his testimony. He said Miles was there.

Mr. Ellis: Wait a minute. I am asking, was there anyone representing them?

Mr. Clark: All right.

Q. (By Mr. Ellis): Now, are you positive that Miles was there?

A. I do place him at that meeting.

Q. Are you sure it was at this meeting?

A. Quite sure, yes.

Q. He has been present at a number of meetings, has he not?
A. Yes, he has. [313]

Q. So it is quite possible that he could be present at some other meeting than this one?

A. It could have been.

(Deposition of Leon K. Sterling, Jr.)

Q. Was there a chap by the name of Spagnola there?

A. I believe he was there. I am not too sure but I believe he was there at that meeting.

Q. And not Sharkey Wright?

A. I don't believe Sharkey Wright was at that meeting, no, sir.

Q. The general discussion, I believe you said, or summary of the general discussion might be that there was a complaint by Olson made there or on file that he wasn't getting enough fights, is that correct?

A. That's correct.

Q. And did he maintain that if he went to the coast he could get more fights and make a living?

A. That is the gist of it.

Q. Was there any discussion at that meeting about money owed by Olson to Campos, if you recall?

A. I don't recall that. I think that the money business came up in the first meeting, that I recall.

Q. That was the February 26, '51, [314] meeting?

A. It might have been that meeting.

Mr. Clark: Whenever that first meeting was.

Q. (By Mr. Ellis): Now, Mr. Sterling, what was the purpose of these checks being produced at this meeting which you said were produced if it wasn't in connection with moneys due?

Mr. Clark: Just a minute. I will object to that upon the ground that it is unintelligible and ambiguous. The question is, or the question doesn't

(Deposition of Leon K. Sterling, Jr.)

advise the witness as to which meeting you are talking about.

Mr. Ellis: We are talking about the meetings that was two or three weeks prior to June 27th.

Mr. Clark: Well, he already told you the checks were produced at the February meeting.

The Witness: The checks were not produced at that meeting.

Q. (By Mr. Ellis): No checks were produced at that meeting? A. I don't recall them.

Q. The checks were only produced at the meeting which you testified to of approximately June 26th? [315]

A. No, that was the second meeting. There was a meeting prior to that one that the checks, as I recall, were first introduced.

Q. What was the first meeting at which the checks were produced?

A. I remember two meetings, Mr. Ellis. The first meeting is the one where the checks were introduced.

Q. What was the date of that?

A. I couldn't give you the exact date of that.

Q. Was that the meeting of February 26, 1951?

A. It might have been.

Q. Now, was there a meeting following that that you recall of '51?

A. We had weekly meetings.

Q. Well, now, may I ask again whether it was at the meeting of February 26, 1951, that the checks were passed around that you mentioned?

(Deposition of Leon K. Sterling, Jr.)

A. If my memory serves me right, there were two meetings and the checks were introduced at the first of those two meetings involving this controversy.

Mr. Clark: Whenever that meeting took place?

The Witness: Yes. [316]

Q. (By Mr. Ellis): When was that meeting that this controversy arose? When was the first meeting with regard to this controversy?

A. Well, apparently from the minutes it was February.

Q. The minutes of February 19th, 1951, Exhibit 12, indicate under 'Carl Olson':

'Boxer Carl Olson filed a verbal notice that there was a disagreement between himself and his manager, Herbert Campos. A motion by Commissioner Sterling that the Commission accept the notification of protests from Carl Olson, was seconded and carried.'

Do you remember that meeting? You moved that his protest be accepted and it was carried.

A. I don't recall that meeting.

Q. You might look at that. There is the official record, referring to Plaintiff's Exhibit 12, is it not?

A. Yes.

Mr. Clark: That being the minutes of the meeting of February 19th.

Q. (By Mr. Ellis): Do you recall that?

A. Yes.

Q. And was it at this meeting of February 19th, 1951, [317] that checks were passed around?

(Deposition of Leon K. Sterling, Jr.)

A. I don't believe so.

Q. All right. Then we come to the next meeting which has been introduced in evidence here as Exhibit 1. And that is the meeting of February 26th, which would be one week later. A. Yes.

Q. And under the caption 'Campos-Olson' it says:

'Mr. Herbert Lee appeared in behalf of Herbert Campos, manager of Carl Olson, in regard to a disagreement between Campos and Olson. He felt that a legitimate and substantial controversy should be established before being submitted for arbitration.'

Do you recall that in the preceding meeting Olson and Campos were advised to get together and name an arbitrator as to both parties? The following week Lee appears on behalf of Campos and presents some arguments on behalf of Campos which are summed up here to the effect that Lee felt that a legitimate and substantial controversy should be established before being submitted for arbitration. Do you remember that argument and discussion? [318]

A. I believe I remember Herbert Lee being there.

Q. (By Mr. Ellis): This is in the open meeting, now? A. Yes.

Q. And do you remember that session in which Mr. Lee appeared and argued at the open meeting about submitting to arbitration?

A. I remember that.

(Deposition of Leon K. Sterling, Jr.)

Q. He opposed it being submitted to arbitration, did he not?

A. Apparently from the record he did.

Q. Now, I notice that Commissioner Flint moved that the Chairman appoint a member of the Commission to consult with all parties and to find out the facts. Do you recall that in this February 26th meeting?

A. Not from memory, sir. Only from the record.

Q. Only from the record? A. Yes.

Q. And that Commissioner Stagbar moved that the entire Commission sit as a whole on the matter. Do you recall that from checking?

A. Only from the minutes.

Q. Then your only recollection of these minutes is from your reading of the minutes [319] themselves now, is that right?

A. As to the order of the events. I remember, I think, this was the first of the meetings where this controversy as to that was heard.

Q. In any event, there was a controversy and an issue at these meetings between Olson and Campos, is that right? A. Yes.

Q. And the Commission suggested that they refer it to arbitration, and then subsequently the Commission decided they would hear it in the executive session, is that right?

A. That's right.

Q. And as a result, the executive session was held on February 26, according to these minutes?

(Deposition of Leon K. Sterling, Jr.)

A. Yes.

Q. Now, was it at this open meeting that any checks were passed around?

Mr. Clark: Which do you mean, the regular or the executive session?

Mr. Ellis: The open meeting.

Q. (By Mr. Ellis): You see, these minutes don't state that, Mr. Sterling, they don't state so far as I can see that the regular meeting adjourned. They merely show at the end that [320] there was an executive session and there is nothing here indicating that that executive session wasn't a part of the regular meeting on the minutes themselves. So I ask my question, therefore, the committee as a whole, then did what, the Commission as a whole, did they close out their open meeting and move on upstairs somewhere and sit in a huddle? How do they go about these executive sessions?

A. We just go into executive session.

Q. In the same place?

A. Yes. But that only meant, I mean, except the actual participants in the body, the rest were asked to leave the room.

Q. You cleared the room with the exception of those involved?

A. Yes. Normally we would have fighters and everybody else around.

Mr. Clark: You have a gallery normally, is that right?

The Witness: Yes.

(Deposition of Leon K. Sterling, Jr.)

Q. (By Mr. Ellis): You had a lot of interested people in the meetings generally? A. Yes.

Q. So you think Mr. Miles was there and Mr. Spagnola [321] was there and you are now referring to the open meeting when the public was present? A. No, sir, no.

Mr. Clark: Just a minute. I will object to that as misstating the witness' testimony. He said he didn't remember Miles there at all. It was at the second meeting in June when he remembered Miles.

Q. (By Mr. Ellis): At this executive meeting that we are speaking of, February 26, 1951, was there anyone present with the Commission besides Olson and Campos in the executive session meeting?

A. I think that is the one where Campos was there. I think Herbert Lee was there.

Q. That is when Lee was there? So far as you recall, Campos was at this executive session?

A. I don't think he was.

Q. So that the only parties there at the time of the executive session on February 26, 1951, would be the Commissioners who were present and Mr. Lee representing Mr. Campos. And was Mr. Olson there? A. Yes, he was there.

Q. He was there? [322]

Mr. Clark: And anyone else who appears in the preamble who was interested in that controversy?

The Witness: Mr. Spagnola was.

Q. (By Mr. Ellis): You think Spagnola was there? A. Yes.

(Deposition of Leon K. Sterling, Jr.)

Mr. Clark: Doesn't it also say——

Q. (By Mr. Ellis): A chap by the name of Haywood Wright was listed as present. Was he in the executive session?

A. If the records say he was there, he must have been there.

Q. The record doesn't say that. They list him as being present at some time during these proceedings. It doesn't say when or how long. The list
Lau Ah Chew. A. I don't recall him.

Q. Was he at the executive meeting?

A. I am not sure.

Q. And Al Lang, was he at the executive meeting?
A. I couldn't place him.

Q. Generally speaking, though, the only parties at the executive meeting would be those who are the interested parties in the controversy to be [323] hear?
A. Yes.

Q. Is that right? A. Yes, that's right.

Q. And these executive sessions usually convened after the general business of the session had been disposed of, is that right?

A. That's right.

Q. Now, at this executive meeting of February 26, 1951, were there any checks passed around among the Commissioners at that time?

A. I believe that is when the first, when I first saw the checks when they were first introduced. That is my memory.

Q. And who produced them?

(Deposition of Leon K. Sterling, Jr.)

A. I don't think—now I am trying to eke the thing out, which is not right.

Mr. Clark: Well, we want you to rely on your memory.

Mr. Ellis: Your best recollection.

Mr. Clark: Just give us your recollection as to who produced the checks.

The Witness: I am not sure. I think it was Herbert Lee that had the checks.

Q. (By Mr. Ellis): You think Herbert Lee?

A. Yes. [324]

Q. They were not Commission checks, were they? A. No, sir.

Q. They were whose checks?

A. We were told that they were issued by Mr. Campos.

Q. What did Mr. Lee, what further did Mr. Lee tell you about these checks that you can recall?

A. That Mr. Campos as manager had incurred certain expenses in taking care of 'Bobo.'

Q. Did he tell you what they were, expenses for what?

A. I think I just recall payments on a car. It may have been household expenses. I don't recall too clearly.

Q. Would you say that there were just one or two checks or many checks?

A. I would say there were more than two.

Q. You would say a bundle?

A. I would say a bundle. I wouldn't know.

Q. There were a number of checks?

(Deposition of Leon K. Sterling, Jr.)

A. A number of checks, yes.

Q. Did you personally go through them yourself?

A. I think I glanced at two or three of them. That's all. [325]

Q. Can you recall anything further that Olson said at this time in connection with his general complaint that he wasn't getting enough fights?

A. I don't recall anything else, not at that first meeting.

Q. And the action, if I may call it that, of the Commission was what, that they get together and see if they couldn't iron out their differences?

A. I believe that is right. That was it.

Q. No other action was taken?

A. No, sir. I don't recall.

Q. Other than get together and see if they can't work it out? A. Yes.

Q. Did the Commission tell them to report back at any future time in regard to settlement as between themselves, if you recall?

A. I don't recall setting any specific date or any specific time for answer on the agreement.

Q. Now, if Mr. Miles was present——

Mr. Clark: Just a minute. He told you twice that he wasn't present.

Q. (By Mr. Ellis): Mr. Miles was no present at [326] conference?

A. I don't recall him being at the first meeting, no, sir.

Q. Pardon me. I am not trying to mislead you.

(Deposition of Leon K. Sterling, Jr.)

But I may have been misled myself. No, if you recall, were there any further meetings at the Commission in which Mr. Olson was complaining about his manager?

A. I don't recall any other except the one just prior to leaving for the mainland.

Q. That is the one that was two or three weeks before June 27th? A. Yes.

Q. Now, we will get down to that meeting that was held some time in June and prior to the departure of Olson for the mainland. And all of these questions will be relating to that meeting. That was a meeting officially called, was it, if you remember?

A. Yes.

Q. By the Chairman of the Commission?

A. Yes.

Q. And where did they meet, the Armory as usual? A. In the Armory.

Q. Was that an open session or visitors [327] were present?

A. I don't recall visitors being there.

Q. Besides the Commissioners, who else are you positive was present?

A. Campos, Olson, I believe Tommie Miles was there.

Q. You are pretty positive about Miles being present? A. Yes.

Q. At that time? A. Yes.

Q. Now, at this meeting were there any checks again brought up or disclosed or shown?

(Deposition of Leon K. Sterling, Jr.)

A. I don't recall checks being produced at this meeting.

Q. Not at this meeting? A. No.

Q. And you stated that Mr. Olson was again complaining about lack of fights? A. Yes.

Q. That he could get fights if he could get to the mainland? A. Yes.

Q. Anything else? Did he say anything else? Did he say anything about not being able to make a [328] living in the islands, no fights and not being able to support himself? A. He may have.

Q. Did he make any statements about being indebted to Mr. Campos and not being able to pay it because he couldn't get enough fights to take care of it? A. I don't recall that.

Q. Now, again, what do you recall Mr. Campos said at that time as much as you can possibly recall?

A. That the subject came up of 'Bobo' leaving and being able to get fights on the mainland and Campos said that he could go.

Q. Did Mr. Campos mention at that time that he wanted to get the money that Olson owed him?

A. He may have.

Q. Was there any discussion at that June meeting of the contract between Campos and Olson?

A. I don't recall at that particular meeting but I know it had come up before that.

Q. What aspect of it had come up before that, if you remember now?

(Deposition of Leon K. Sterling, Jr.)

A. Well, just other dates and the times, the time of that particular—— [329]

Q. As to whether the contract was in effect?

A. Yes, at that time, just from referring to the minutes, Campos signed, I assumed that he signed the contracts for the Chuck Hunter fight.

Mr. Clark: You are speaking of contracts with promoters?

The Witness: Yes, that Campos signed as manager.

Q. (By Mr. Ellis): Now, I call your attention to Plaintiff's Exhibit 5 in this action on the stationery of the Territory of Hawaii, Territorial Boxing Commission, a letter dated October 5, 1953, address 'To Whom It May Concern,' and I ask you to look at that and read it. (Handing a document to the witness.) Were you present when that was granted or requested from the Commission?

A. No.

Q. Do you remember that letter?

A. I don't recall. If my memory serves me right, I made a request of the Commission to check on the dates of the Commission Secretary.

Q. Of the dates? A. Yes. [330]

Q. Of the effective date and expiration date?

A. Yes, of the contract between Olson and Campos. The contract was on file with us.

Q. And as a result, the information contained in that letter or similar information was furnished you by the Secretary? A. Yes.

Q. Do you recall, Mr. Sterling, while you were

(Deposition of Leon K. Sterling, Jr.)

Commissioner any discussions before the Commission relating to the so-called civil or contract nor filed on the official commission form? That is between Olson and——

Mr. Clark: Just a minute. I am going to object to that as being beyond the scope of the direct examination and not proper cross-examination. If you want to make this gentleman your own witness, Mr. Ellis, from this point on, it is quite all right with me. But anything beyond the scope of my examination is objectionable in this deposition. Do you want to call Mr. Sterling as your witness? If so, that is fine. You can call him right now. But not on my deposition.”

Then there is some colloquy, but I don't think that is material, Mr. Ellis. [331]

The Court: No. Read the next question.

Mr. Clark: Yes, the next question.

Q. (By Mr. Ellis): If I should tell you, Mr. Sterling, that your resignation was tendered July 20th, 1953, as shown by the minutes of that meeting, would that refresh your recollection as to the time of your tenure as Commissioner from 1948 until July or thereabouts of 1953? A. Yes.

Q. And at that time the record shows that one Adam Ornelles was appointed as Commissioner?

A. I believe he was. A Republican.

Q. As a matter of fact, Mr. Sterling, don't you recall at this June meeting prior to June 27th that Mr. Campos stated to the Commissioners assembled that Olson could go anywhere he wanted, that he

(Deposition of Leon K. Sterling, Jr.)

could fight anywhere he wanted, that he could fight with anyone he wanted, that his only interest was in recovery of the moneys owned by Olson to him?

A. I don't recall that clearly. I don't recall that.

Q. Well, are you positive that the statement to that effect and more or less in that language [332] could not have been made at that meeting?

A. I don't recall the money part of it. I recall Mr. Campos saying he could go and fight. But I don't recall the money part of it, the fact that the only reason he wanted to fight was to get the money back. I don't recall that. But I do recall distinctly that he said he could go and fight outside of the Territory.

Q. And he could fight anyone he wanted to and anywhere he wanted?

A. I don't recall for anyone he wanted to.

So far as you can recall, nothing was said in that meeting of the debt, the amount of money that Olson was indebted to Campos at that time?

Mr. Clark: The June meeting.

Mr. Ellis: We are talking about the June meeting.

Q. (By Mr. Ellis continuing): We are talking about the June meeting. So far as you can recall, nothing was said about that?

A. It may have been brought up but I am not too sure, Mr. Ellis.

Mr. Ellis: That's all.

Mr. Clark: That's all. Thank you very [333] much."

* * *

Mr. Clark: I am offering only the following parts.

The Court: All right.

Mr. Clark: Of the Dr. Withington deposition. This, your Honor, is the deposition of Dr. Paul Withington taken on July 1, 1955, in Honolulu in this case, and I'm commencing at line 12, page 45.

Mr. Ellis: All right.

DEPOSITION OF DR. PAUL WITHINGTON

Mr. Clark: (Reading.)

"Now, having been shown the minutes of the meeting of June 19th at which the Chuck Hunter cancelling was approved by the Commission with the consent of the principals, and the letter [335] of June 27th from Campos to the Commission, can you tell us approximately when it was that this informal meeting not covered by any minutes was held by the Commission for the purpose of discussing Olson's desire to go to the mainland?"

Now, we have the same stipulation as to Dr. Withington, Mr. Ellis; he is not available as a witness?

Mr. Ellis: He is in the islands.

Mr. Clark: Now, also may it be stipulated Dr. Withington was the chairman of the Territorial Boxing Commission during 1951?

Mr. Ellis: Yes.

(Deposition of Dr. Paul Withington.)

Mr. Clark: At the time we are interested in and was a member, of course, of the commission?

Mr. Ellis: That's correct.

Mr. Clark: Very well.

(Continuing reading.)

"A. Well, I am very sure from the dates on this letter and the date of the meeting, the minutes of the meeting of the 19th, that this informal meeting occurred between these two dates. In other words, between the 19th of June and the 27th of June, 1951——

Q. You think it was after June 19th and prior to [336] June 27th?

A. I am quite sure of it.

Q. All right. Now, where was that meeting held?

A. That meeting was held in the Boxing Commission office in the upstairs room, our meeting room which is on the second floor of the Boxing Commission.

Q. And do you remember who was present?

A. Yes, I think that all the members of the Commission were present. I may be possibly wrong on the question of Sterling because, as you noticed in the minutes, they say that Sterling was absent on duty and Dowsett was absent on duty, as they were both reserve officers and they were serving their periods. So I am not sure of that. I think Dowsett was present but I am not quite sure about Sterling. But I think the whole Commission was

(Deposition of Dr. Paul Withington.)

present at that time. And as far as I know, besides that Bobby Lee, the Secretary-Administrator, was present and Olson and Herbert Campos. And I don't remember that anybody else was present.

Q. That is just what I was going to ask you. Do you remember whether or not a man named Tommie Miles was present? [337]

A. I am not certain but he may have been present. I have an impression of his being present at one of the meetings when we were discussing with Campos and Olson—we were discussing the Campos-Olson question when Olson was present and Miles I think came with Olson and he was present.

Q. All right, now, Dr. Withington, was this the only meeting not covered by the minutes I have shown you which was held regarding the Olson-Campos disagreement or was there more than one informal meeting?

A. I don't remember any other meetings. I think it was the only one meeting which was not a formal meeting, that is, that was called. My memory on that question is that Lee called me during my morning office hours and said that Olson had come in and wanted to go to the mainland and that I think he also at that time said that he and Campos had come in and, as stated before, Lee was directed to find out what he could about Olson's going to the mainland. And also earlier they had been advised to see if they couldn't settle, straighten out their difficulties. And so there was in this entire

(Deposition of Dr. Paul Withington.)

period the question [338] of Olson-Campos that was in the minds of the Commission.

Q. In other words, the Commission was conscious of it?

A. Quite conscious of it. And as to this meeting, as I remember, I told Lee to call the Commission together for an informal meeting to hear what the matter was and then if it was necessary we would call a formal meeting for it. And the meeting was held, I am quite sure, at noon time about 12:30. And, as I remember, all the Commissioners were there, and only the interested parties. And it is quite possible that Miles and Sharkey Wright, both of whom were interested in Olson in a friendship way and as having also participated in his activities one way or another—I am not sure that they were not present, although neither one of them took any part in the discussion of the meeting. If they came at all, they came as friends of Olson's."

The Court: It takes the witness a long time, over a page and a half, to try and say who he thinks was present in the meeting.

Mr. Clark: I am sorry, your Honor, but Dr. Withington is that way. [339]

The Court: Oh, I am not blaming you.

Mr. Clark: We couldn't stop him. It was a very hot afternoon and—just as soon he hadn't been so verbose.

"Q. And it is your recollection that at one meeting Miles was present?

A. Yes; I am sure that Miles was present at one

(Deposition of Dr. Paul Withington.)

meeting in which the Olson question was discussed.

Q. All right. And you are also quite positive, doctor, that this was the only meeting which is not covered by the minutes I have shown you?

A. I am quite sure of that.

Q. Very well. Now, will you please tell us in substance as nearly as you can now remember, approximately four years later, what occurred at that meeting? And by that I mean, what was said in substance by the various parties in the presence of the Commission and anyone else who might have been present.

A. As I remember, Campos and Olson sat on the same side of the table in the set-up we had there. It was a long table in a rather long room, the table running longitudinally in the room and Campos and Olson sat there. I have, as I say, as indistinct remembrance of Tommie Miles having come up and sat down on my left hand. I was at [340] what we call the Waikiki end or the Diamond Head end of the table and the other Commissioners were seated on the side and, as I picture it at the time, Miles being on my left at the far end of the table, not sitting at the table proper. And then Sharkey Wright came up during the meeting and sat down behind me at a little table over my left shoulder.

“And the question was, Lee reported to us that Campos and Olson had come to some sort of an agreement and so they were asked to express themselves. And in that meeting Olson said that he

(Deposition of Dr. Paul Withington.)

wanted to go to the mainland and he could get fights on the mainland, that Flaherty could get him fights.

“Q. He mentioned Flaherty, did he?

A. Yes; I am quite sure he did. And he mentioned Flaherty before. Of course, Flaherty had been acting as his agent when he fought in California earlier and he mentioned that in that letter about Flaherty, in one of those things he mentioned that he wanted Flaherty or he wanted to fulfill agreements with Flaherty.

Q. You mean one of these letters that I showed you a while ago that are in evidence?” [341]

Referring to a letter which went in this afternoon, your Honor.

“A. Yes.

Q. May I interrupt you for a moment, doctor? Either at this meeting which you placed at having occurred between June 19th and June 27th, 1951, or at any prior meeting did Olson state to the Commission that he had been in contact with Flaherty?

A. No; I don't think he ever stated that he had been in contact with him. I never made any such statement that he did. All of us knew more or less that he had been in contact with him. We assumed that he had.”

Mr. Ellis: We object to lines 3 and 4 as a conclusion of the good doctor, and ending with the words, “We assumed that he had.”

Mr. Clark: That may go out.

The Court: Well, what difference does it make?

(Deposition of Dr. Paul Withington.)

Mr. Olson has testified that he worked with him on occasion.

Mr. Clark: Yes, your Honor.

“We assumed that he had. And at that meeting Olson expressed his desire to go to the mainland, that he wanted to go to the mainland, that he needed to earn money and he could get fights [342] there and he wasn’t getting them here. And he was particularly upset because of the cancelling of this Hunter fight on that date. And also at the meeting Campos said that he did not want to keep the boy from making money and that they had talked it over and he was willing for him to go to the coast to make money. They were questioned quite fully. I am very sure that I myself questioned with rather leading questions as to what their relationship would be. That is, I didn’t say to them outright, are you breaking the contract? But I gave them sufficient opportunity, both of them, in questioning them to let them bring before the Commission if they wanted to question the contract. But that was not a subject of that meeting. I mean, it did not come up.

“And the Commission, after listening to the two men, came to the conclusion that it was all settled, that Campos would allow Olson to go to the coast, that he did not want to keep him from earning some money.

“Q. Do you remember what Campos said in that respect; just in substance?

(Deposition of Dr. Paul Withington.)

A. Yes. That he did not want to stand in the way [343] of the boy making some money.

“Q. Was anything said, doctor, at all at that meeting by either Campos or Olson regarding any financial arrangements between them in consideration of Olson’s fighting on the mainland?”

A. No. That did not come into the discussion whatsoever. As I say, I am quite sure that some of my questions were so leading as to give them an opportunity to do that. But I can say very frankly that nothing came to the Commission which would require alteration or abrogation of the contract.”

Mr. Ellis: What you have just read, Mr. Clark, your Honor, I object to those as being conclusions of the good doctor as to the abrogation of the contract.

Mr. Clark: Oh, I submit that, your Honor. Here is the chairman of the Commission saying what came before it.

The Court: It was his conclusion. If I were sitting there I might come to a different one.

Mr. Clark: No; he is making a statement of fact that nothing was said about abrogation, nothing came before it. That’s what that means.

Mr. Ellis: That is his conclusion.

The Court: Merely his conclusion, I think.

Mr. Clark: He says, “I can say very frankly that nothing [344] came to the Commission * * *”

The Court: All I can say, if I were sitting there instead of the chairman, I would have come to a different conclusion. That merely shows that it is

(Deposition of Dr. Paul Withington.)

a conclusion rather than a statement of fact, that's all.

Mr. Clark: Your Honor's ruling?

The Court: If I were sitting there, or if you were, as a lawyer, you would maybe come to the same conclusion because your caution would have urged you to say, "Now, let's see definitely what you are going to do and we'll get it clear."

Mr. Clark: I am sure I would have come to the same conclusion in this case had I been there in June of 1951. May I have your Honor's ruling?

The Court: Yes. I think that sentence, lines 10 and 11, page 51, should go out.

Mr. Clark: Very well. 10 to 11 on page 51?

The Court: Yes.

Mr. Clark: (Continuing reading.) "It was simply the willingness of a manager to let the boy go and fight on the mainland becaues he needed the money. But that the contract was still in force."

Mr. Ellis: That's a conclusion of the doctor again.

The Court: Yes.

Mr. Ellis: Ask that be stricken. [345]

The Court: That's really an interpretation.

Mr. Clark: That is his conclusion.

The Court: That is really what you are asking this court to decide; isn't it?

Mr. Clark: That is right.

The Court: The meaning of what took place?

Mr. Clark: That's his conclusion, your Honor; you will have to decide that.

(Deposition of Dr. Paul Withington.)

Reading on.

“And in discussion with the Commission after we had listened to them, I pointed out to the Commission that we have nothing before us, that actually we had nothing before us that we had any authority to step in to. It was purely a matter between a manager and his fighter, that no Commission rule or no contract was being violated and, therefore, we had nothing before us that we had to make any decision about. It was their proposition and not ours.

Q. There was no request by Olson or by anyone in his behalf that this contract be abrogated.

A. No; but I think——

Q. Your answer?

A. I said, “No. I would like to finish. And that that I think is the reason that there was no [346] formal minutes, nor was the meeting considered formal because we did not have anything before us that was of a real Commission business. In other words, what occurred was nothing that the Commission had any power, in spite of its wide powers, to act on. The fighter wanted to go to the mainland and his manager didn’t object to his going to the mainland.

“Q. I see. And, as I understand it, there was no issue before you as to whether the contract should or should not be cancelled?

A. There was no issue, no Boxing Commission issue so far as we were concerned. And that, of course, would include anything about changing or abrogating the contract.

(Deposition of Dr. Paul Withington.)

Q. So that so far as the Commission was concerned, doctor, the contract was still in effect?"

Mr. Ellis: Your Honor, we ask that——

Mr. Clark: Wait until I finish.

Mr. Ellis: We object to that as being an outright legal conclusion by a medical doctor.

Mr. Clark: That's not a legal conclusion. I say, "So far as the Commission was concerned."

Mr. Ellis: That's his Honor's duty to decide.

Mr. Clark: Let me finish my statements, please, Mr. Ellis, [347] instead of interrupting constantly.

Our position, may it please your Honor, is that that is what—that that question so far as the Commission was concerned, the contract still in effect, calls for the attitude of the Commission, right or wrong. It's no attempt by the witness to pass upon the contract.

The Court: I am not expected to pay any attention to that, am I?

Mr. Clark: No; you are not.

The Court: Then I think it should be stricken.

Mr. Clark: I want to show that there was no such thing before the Commission at all.

The Court: That's what the Commissioner says; but it doesn't necessarily follow that the legal effect of what was done was not reserved for this court.

Mr. Clark: That's not what I am saying, your Honor. I only want to show that there was no such thing before the Commission. That's not a legal proposition.

(Deposition of Dr. Paul Withington.)

The Court: He has said at some other place here that——

Mr. Clark: Well, so far as I am concerned, your Honor, the subsequent letters——

The Court: There was no request by Olson or by anyone in his behalf that this contract be abrogated. When he answered no; that was a statement of fact.

Mr. Clark: All right. [348]

The Court: But the rest of it is all conclusion.

Mr. Clark: So far as I am concerned there is no necessity of it, because the communications from the Commission in answer to Campo's demands, which are in evidence, show clearly that the Commission considered the contract was still in effect. So I don't need this.

The Court: My opinion offhand is that I am not concerned with what the Commission did about it.

Mr. Clark: Certainly not binding on your Honor in the least.

The Court: This is in the civil courts for a breach of contract; it doesn't make any difference what the commission said about it.

Mr. Clark: To clarify the record, may I take the ruling: "Q. So that so far as the Commission was concerned, doctor, the contract was still in effect?

"A. That is quite right."

There is an objection to that.

The Court: Yes; lines 15 to 17 will be stricken.

Mr. Clark: Very well.

The Court: As an opinion and conclusion of the witness.

Mr. Clark: And that ends, may it please the Court, at line 18, page 52, and we offer that in evidence as part of Plaintiff's case.

The Court: That is from line 12, page 45, to and [349] including line 18, page 52?

Mr. Clark: Yes, your Honor, line 12, page 45, to line 18, page 52.

Mr. Ellis. Subject to the objections of those portions stricken. [350]

* * *

Mr. Clark: This, may it please your Honor, is the deposition of Henry H. Wong taken on July 8, 1955, in this case. I may state to your Honor, that the purpose of calling Mr. Wong, whom the record shows was the notary before whom these contracts were signed between Campos and Olson, was to develop the fact that he had actually read and explained the agreements to Mr. Olson, and so forth. So I am not going to burden your Honor with that portion of it dealing with that subject, but I want to offer the entire deposition in evidence and read only a short [351] portion of the redirect examination which has to do with another matter.

The Court: Very well.

Mr. Clark: So I will offer the entire deposition, your Honor. [352]

* * *

The Court: Well, are you willing to stipulate that the contract was signed and executed before the notary and that the notary explained the contract to your client?

Mr. Ellis: Not the contract, the document.

The Court: All right. You're getting as bad as the rest of them now. The paper was explained, the terms of the paper were explained by the notary to Mr. Olson?

Mr. Ellis: I will stipulate that Mr. Wong says he explained the documents to Mr. Olson prior to their being signed. [355]

The Court: That that is his testimony?

Mr. Ellis: That's right.

The Court: Is that sufficient?

Mr. Clark: It is not sufficient in view of the impact——

The Court: All right, you offer it.

Mr. Clark: I am just offering it. I am not going to read it.

The Court: I will allow the deposition to be in evidence, and if there is any question concerning this phase of the matter I will read the deposition later.

Mr. Clark: All right. Now, I want to read just a very short portion of it on another subject.

The Court: What page?

DEPOSITION ON HENRY H. WONG

Mr. Clark: Commencing at page 35, line 22, re-direct examination by Mr. Clark.

“Q. Mr. Wong, you have stated on your cross-examination by Mr. Ellis that you had certain conversations with ‘Bobo’ himself regarding Herbert’s management. Can you tell us where any of those took place?

(Deposition of Henry H. Wong.)

A. Around the ranch yard there.

Q. And about when?

A. Well, at about the time that these documents were being signed.

Q. Which ones, the '48 document or the [356] '49 document?

A. Well, both. Before the signing of both documents, before the signing and after the signing I had talks with 'Bobo.'

Q. Now, take the talks regarding the '48 document. Do you remember where those took place?

A. Right at the ranch yard. It is about the only place.

Q. Right at the ranch yard? A. Yes.

Q. And do you remember whether anyone else was present?

A. Oh, I couldn't mention any names now. But there was always a group of people.

Q. Around the ranch?

A. Around the ranch; yes.

Q. Is the office located at the main headquarters of the ranch? A. Yes.

Q. In other words, the office building is the main headquarters; is that right? A. Yes.

Q. And there are numerous employees at the ranch at all times? [357]

A. Yes; the employees live right on the ranch.

Q. I see. And there are other persons employed in the office, I take it?

A. Excepting on one short period, why, Herbert sort of ran the office.

(Deposition of Henry H. Wong.)

Q. He ran the office himself? A. Yes.

Q. Now, on this first occasion when you talked to 'Bobo' about the '48 contracts, what did he say about Herbert managing him?

A. Well, he gave me the impression that with Herbert signing up as his manager, why, Herbert was being a sort of a saviour to him. He was in the dumps. He just wasn't getting anywhere and he was financially just embarrassed. He looked to Herbert to hold him both as a manager and financially.

Q. This was with regard to the '48 agreement—right?

Mr. Ellis: That last—may I interrupt? That last answer, lines 15 to 17 is a conclusion of the notary and I ask that it be stricken.

The Court: It is his opinion and conclusion.

Mr. Clark: I don't think it is a conclusion at all. It is the way those people—in fact, in one of the depositions [358] that is explained. In fact, Stagbar uses "impression" and then he testifies that—perhaps their English isn't as apt down there. What he means to say is that that was what was said. That's in Stagbar's deposition.

Mr. Ellis: This is a notary public. He should know better.

The Court: What did you say?

Mr. Ellis: I say, this is a notary public. He should know better than to state impressions.

The Court: He says, "He gave me the impression * * *"

(Deposition of Henry H. Wong.)

Mr. Clark: I will take a ruling.

The Court: You know, nobody's life or property would be safe in this country if we ruled on what people's impressions were.

Mr. Clark: I will take a ruling, your Honor.

The Court: I will sustain the objection.

Mr. Clark: Very well.

“Q. This was with regard to the '48 agreement—right? A. Yes; '48.

Q. Now, were there any similar conversations regarding the '49 contract?

A. Well, I don't remember talking with 'Bobo' on many occasions and I don't recall now.

Q. You can't segregate them? [359]

A. No.

Q. But it was along about the time these contracts were executed? A. Yes.

Q. Now, what if anything, did 'Bobo' say about Herbert's managing him at these subsequent conversations?

A. Well, he has always given me the impression, he made the statement at different times that Herbert was treating him royally, treating him better than anyone else would treat him.

Mr. Clark: That's all.”

Mr. Ellis: Your Honor, we object to that as being a conclusion because he says, “He has always given me the impression.”

The Court: And then he says, “He made the statement.” I will overrule that objection.

Mr. Clark: And that ends, your Honor, at line 10, page 38.

The Court: That is all you wish to read?

Mr. Clark: That's all I propose to read.

The Court: Now, do you wish to read anything from this deposition, Mr. Ellis, or do you want to defer that?

Mr. Ellis: On this deposition? I have no questions to read. [360]

* * *

SID E. FLAHERTY

one of the defendants herein, called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name to the Court.

The Witness: Sid E. Flaherty.

Direct Examination

By Mr. Clark:

Q. Now, Mr. Flaherty, where do you live, please? A. 2636 Great Highway.

Q. In San Francisco? A. San Francisco.

Q. You, of course, are the Sid Flaherty named as a defendant in this case? A. That's right.

Q. Are you the present manager of Carl "Bobo" Olson? A. That's true.

Q. Now, Mr. Flaherty, am I correct in stating that continuously since July 9, 1951, all the fights shown by Mr. Olson's ring record have been under your exclusive management? [362]

A. That's right.

(Testimony of Sid E. Flaherty.)

Q. Clear up to date? A. Yes.

Q. Now, directing your attention to the month of June, or early July, 1951, did you arrange with Mr. Thomas Miles to pay Mr. Olson's way up here from Hawaii? A. It hasn't been paid as yet.

Q. Well, let me call your attention to the deposition you gave in this case, and I want to direct your attention particularly to page 73, starting at line 10, and I will ask you whether the following questions were asked by me and whether you gave the following answers. You, of course, remember the occasion of your deposition being taken?

A. Yes.

Q. In my office? A. Yes.

Q. All right.

“Q. Did you pay Olson's transportation up here? A. The last time?

Q. Yes. A. Yes; I returned it to Mr. Miles.

Q. Miles put it up, did he?

A. I believe he did.

Q. And was that pursuant to any arrangement with you? [363]

“A. As far as I remember, I received a telegram from Tommie Miles telling me that Olson had been turned free by the Commission, he was a free agent; asking me what—if the boy wanted to come up, what should he should do, and I remember telling him to send him, or something to that effect, and I would reimburse him, as long as their troubles had been ironed out down there.”

Now, did you give those answers to my question?

(Testimony of Sid E. Flaherty.)

A. I did.

Q. On the occasion of your deposition?

A. I did.

Q. And were they true?

A. I believed that I had paid it and I hadn't. I checked through correspondence with Tommie Miles, and he was kiddingly asking me to pay for the ticket at a later date, which I had not done.

Q. But you did arrange with him or authorized him to advance the fare? A. That is true.

Q. For how long had you known Tommie Miles prior to June, 1951?

A. I would say about the year, 1943.

Q. Am I correct in stating that in 1943 you were in the islands in the Army and did some handling of fighters down [364] there?

A. That's true.

Q. And in that connection you met Tommie Miles, who was Secretary of the Territorial Boxing Commission? A. That's right.

Q. At that time, Mr. Flaherty, was Mr. Miles matchmaker for Leo Leavitt?

A. Not to my knowledge.

Q. Not to your knowledge? A. No.

Q. Now, subsequently, in late 1946 and 1947 you handled Olson up here in San Francisco for Leavitt; isn't that true? A. That's true.

Q. Yes. And then Olson returned to Hawaii in early 1947? A. That's right.

Q. All right. Now, after Olson's return to Hawaii did you arrange to send opponents for him

(Testimony of Sid E. Flaherty.)

down to Leavitt? A. Yes.

Q. And that, we will say, was in early 1947, I take it? '46-'47?

A. I will say this much, it was before he signed a contract to box for Miller.

Q. Yes; and the record here shows he signed the Miller contract on February 3, 1947, I believe. All right. Now, in that connection, in getting opponents for Olson to fight [365] under Leavitt, did you correspond with Mr. Miles on that?

A. No.

Q. You did not?

A. No; not to my knowledge.

Q. Well, simply for the purpose of refreshing your recollection on that, Mr. Flaherty, I want to show you a photostatic copy of a letter which was produced from the Territorial Commission files dated January 10, 1947, the salutation being "Hello, Tom," and the signature being "Regards, Sid." Is that your signature? A. Yes; it is.

Mr. Ellis: Just a minute. Now, in connection with those letters, are those letters 9-A, -B and -C?

Mr. Clark: 7-A.

Mr. Ellis: What was the date of it?

Mr. Clark: June, 1947.

Mr. Ellis: We object to any correspondence in connection with the year 1947 as being totally irrelevant in this case, prior to the contract between, or any agreement between Campos and Olson which is the gist of this action, and correspondence be-

(Testimony of Sid E. Flaherty.)

tween Miles and Flaherty is too remote and irrelevant.

Mr. Clark: The purpose, Your Honor, is only to establish the association or relationship between this witness and Mr. Miles, which we contended existed at that time and [366] continuously clear up to the present time.

Mr. Ellis: That has no bearing on the second cause of action whatsoever.

Mr. Clark: Just a minute. The evidence shows that Mr. Miles was talking to Olson, that he advanced money to Olson during the spring of 1951, and he was the intermediary who notified this witness of Olson's coming here and made the arrangements for the transportation.

The Court: The witness has already testified to that.

Mr. Clark: Well, I want to establish the relationship between them, if I can. My question was whether he was in correspondence with Mr. Miles back in 1947 regarding Mr. Flaherty getting opponents for Olson.

Mr. Ellis: What difference does it make?

Mr. Clark: I am only calling this to his attention to refresh his recollection.

Mr. Ellis: And hearsay as to the defendant Olson.

Mr. Clark: I will submit it, Your Honor.

The Court: I don't quite see what the materiality of it is. The witness has already stated that he was in communication in 1951?

(Testimony of Sid E. Flaherty.)

Mr. Clark: No, the witness has said, in response to my question regarding his first association with Miles that he did not correspond with him in connection with getting opponents for Olson. Now, that's part of the relationship [367] between these people, Your Honor, and I think I am entitled to establish as best I can the association between Miles and this witness.

The Court: Well, let him answer. I don't consider it to be of much materiality.

Mr. Ellis: Before he answers, just one more observation for the record, Your Honor.

The complaint, as you know, alleges a violation on June 27, 1951, a so-called invasion of the alleged rights of one Campos, the plaintiff. Now, here comes—I made no objection to how long he has known Mr. Miles, that's just preliminary, but it doesn't make any difference. Suppose he has known Miles since the day he was born?

The Court: He said he knew him since 1943.

Mr. Ellis: I know, from 1943 on, but here is now the attempt to introduce correspondence into this record, correspondence in 1947 between this witness and Mr. Miles, which certainly is too remote in connection with the alleged invasion of the so-called legal rights, if any.

Mr. Clark: My purpose, Your Honor, is to establish a business relationship between them with respect to this fighter Olson as far back as '47.

The Court: Why don't you ask him that question?

(Testimony of Sid E. Flaherty.)

Mr. Clark: He has already said no, and I was calling his attention to a letter. [368]

The Court: Why don't you ask him if he had any business relationship at that time?

Mr. Clark: Did you have any business relationship with Mr. Miles regarding your securing opponents for Olson back in 1947?

A. Business relationship?

Q. Well, that's the trouble, you're attempting to define a term.

A. Would you allow me to answer your question as best I can?

Q. Yes.

A. You asked me about getting opponents, and I thought you referred to Miles acting as matchmaker or manager for Mr. Olson, that's what I understood, and that's why I said no.

Q. Let's have the answer, then.

A. He wrote me occasionally about other fighters as well as Olson, whether the opponent was suitable, because he was on the Commission at the time and he didn't want any mismatches, and I answered him to the best of my ability.

Q. All right. Then you did have correspondence regarding Olson? A. Yes.

Q. Would you regard Mr. Miles then as far back as 1947 as being a close friend of yours?

A. Yes. [369]

Q. Very well. Now, Mr. Flaherty, in June of 1951, did Mr. Miles advise you either by telephone or cable that Carl Olson wanted to come up to San

(Testimony of Sid E. Flaherty.)

Francisco and place himself under your management?

A. I don't know whether it was Mr. Miles or Mr. Olson wrote me the first letter.

Q. Well, I am not concerned about the first letter. The thing I am asking you is whether Miles either telephoned you or cabled you telling you that Olson was about to come up?

A. I believe he did.

Q. Yes. And was that shortly before Olson's arrival?

A. Possibly a day; two at the most.

Q. Yes. And was it as the result of that communication, whatever it was, that you arranged with Miles to pay Olson's transportation?

A. Yes.

Q. Very well. Now, directing your attention to the date of July 14, 1948, which is the date of the first Campos-Olson contract in evidence in this case, can you tell us, Mr. Flaherty, about when it was that you became aware that Olson was under contract to Campos?

A. I couldn't say that on the date——

Q. I don't want the date. I want the approximate time.

A. That I don't remember.

Q. Well, again let me call your attention, just to refresh [370] your recollection, to your deposition which was taken on February 3 of this year. I will ask you to read with me, Mr. Flaherty, the questions and answers commencing at line 11, page 29, which I asked you on that occasion and the answers you gave:

(Testimony of Sid E. Flaherty.)

“Q. Mr. Flaherty, after hearing the result of the case brought in Hawaii by Lipton and yourself based on these agreements we have already identified, did you subsequently become aware as to whether Olson had signed a further contract, or a contract, with a man named Herbert Campos, namely, the plaintiff in this case?

“A. I believe from reading the newspaper I did, yes.

“Q. I will show you in that connection a photostat of what purports to be a memorandum of agreement dated July 14, 1948, approved by the Territorial Boxing Commission on July 19, 1948, and between Herbert Campos and Carl E. Olson, ring name Carl ‘Bobo’ Olson, for the term of five years, expiring, according to the notation on it, on July 18, 1953, and the copy of which I am showing you is purportedly signed by Herbert Campos and Carl E. Olson. I will ask you whether it was about the date shown on that agreement, namely, July 14, 1948, that you became aware of [371] the fact that Olson had signed with Campos.

“A. I will answer it in this way: It couldn’t have been possibly too long afterward when I was aware of the fact.” A. That’s right.

Q. Now, that’s correct, is it?

A. That’s correct.

Q. Now, let me show you, Mr. Flaherty, an agreement dated September 26, 1949, on what I think is the California Athletic Commisison form signed by

(Testimony of Sid E. Flaherty.)

yourself and Mr. Olson, which is Plaintiff's Exhibit 9 in this case. This is the California form, is it not?

A. That's right.

Q. Now, with the date of this agreement in mind, I want to ask you whether you ever entered into any further agreement with Mr. Olson on the California form which is on file with the California State Athletic Commission? A. No.

Q. In other words, this document, Plaintiff's Exhibit 9, is your present contract on file with the Commission? A. That's true.

Q. Is that right? A. That's right.

Q. Now, in June of last year there was organized a corporation known as Sid Flaherty Promotional Enterprises, [372] Inc., is that correct?

A. That's right.

Q. And where you instrumental in causing that company to be formed? A. That's true.

Q. Now, am I correct in stating—and about when was that? May we have the date of it, Mr. Ellis?

Mr. Ellis: June 7, 1954.

Mr. Clark: June 7, 1954.

Q. Is that correct, Mr. Flaherty?

A. That's correct.

Q. Now, since the date of the organization of that company have the entire purses due you and Mr. Olson from the various fights shown by his ring record been paid to that company?

A. That's true.

Q. And am I correct in stating that upon receipt

(Testimony of Sid E. Flaherty.)

of the purses by the company, then you and Mr. Olson received salaries from the company?

A. That's true. [373]

* * *

Q. (By Mr. Clark): Now, I am not concerned about the internal workings of this corporation. My only question is this: Did you assign any rights you might have as manager to this corporation?

A. Not as——

Mr. Ellis: Calls for a conclusion and I object to it.

Mr. Clark: I think it is perfectly proper. [376]

The Court: What are you getting at?

Mr. Clark: The corporation is named as a defendant and if it now has become, with knowledge to Mr. Flaherty, interested in the management of Olson, it likewise is participating in the continuing interference with the Campos contract. That's my purpose. That is the theory upon which he is named as the defendant.

The Court: Well, of course; according to Mr. Ellis' statement, this procedure has nothing to do with the management contract, which is a personal matter between this witness and the defendant Olson.

Mr. Clark: May it please your Honor——

The Court: It is a means by which the proceeds of the fight are handled.

Mr. Clark: The witness testified differently on deposition, and I am entitled to develop that.

The Court: I am not interested what the witness

(Testimony of Sid E. Flaherty.)

thinks about a legal arrangement. The lawyers can better answer that.

Mr. Clark: He knows whether he signed his rights. That is no legal proposition. An assignment is an assignment. It doesn't take a lawyer to know whether he is giving away his rights.

The Court: You might ask whether he executed some form of a document, or some other act—— [377]

Mr. Clark: Then I will do this, your Honor, if I may.

The Court: Isn't Mr. Ellis' statement sufficient as to the nature of the activities?

Mr. Clark: No.

The Court: Of this corporation?

Mr. Clark: No, it doesn't point to what I had in mind.

The Court: What is the particular point you want to get to?

Mr. Clark: I want to establish the rights of management, of Mr. Flaherty, were assigned to his company and that it now is interested in the management of Olson. It receives the entire purses; it is a defendant in this case.

The Court: Can't you make some sort of stipulation that will cover it?

Mr. Clark: Well, let me just offer two sentences out of the deposition, your Honor, and then you can rule on it.

The Court: You can do it, Mr. Clark, but I am

(Testimony of Sid E. Flaherty.)

not interested in what a lay witness says about a legal relationship.

Mr. Clark: Very well, your Honor.

The Court: If it is capable of determination the lawyers can do that. That's one of the things we cut through in the federal procedure, to avoid things such as this.

Mr. Clark: Very well.

The Court: A longwinded procedure. Can't you make some [378] sort of a stipulation as to what the——

Mr. Ellis: I can state this——

Mr. Clark: I will take the stipulation Mr. Ellis gave.

Mr. Ellis: You will do what?

Mr. Clark: I'll take the stipulation you gave.

Mr. Ellis: That there are no assignments to this corporation by these fighters or by their employees. The corporation negotiates and makes a bout and files the contract. The contract is the corporation contract and the promoter is the other individual, and the corporation receives the money. Then the corporation carries out its employment contracts.

Now, there is nothing that is assignable on the part of Mr. Flaherty or anyone else to this corporation; the corporation is a promoter.

Mr. Clark: Then as I understand it, Mr. Flaherty is still acting solely and exclusively as the manager of Olson, is that correct?

Mr. Ellis: That is right.

Q. (By Mr. Clark): That is correct?

(Testimony of Sid E. Flaherty.)

A. That is correct.

Mr. Clark: Your answer to that is yes?

A. Yes.

Mr. Clark: All right, that satisfies me.

Q. Now, I want to call your attention, Mr. Flaherty, to a [379] photostatic copy of "Bobo" Olson's earnings for the years 1951, 1952 and 1953.

Mr. Ellis: What exhibit is that, Mr. Clark?

Mr. Clark: Which is Exhibit, Plaintiff's Exhibit 7.

Q. And I am correct in stating, am I not, that this was furnished by you on deposition?

A. That's right.

Q. And you were examined by me as to the sources of it at that time? A. That's right.

Q. Now, will you agree with me, Mr. Flaherty, that purely through inadvertence there was omitted from this exhibit one fight which took place on August 27, 1952, with Eugene Hairston in New York? A. I believe there was.

Q. And that the net purse there, after deducting expenses, was \$5,838.88. And by the way, these figures were furnished to me by Mr. Gallen from a memorandum you gave him, if you recollect.

A. Well, I don't recollect the figures.

Q. Well, will you accept those subject to correction? A. Yes.

Q. Very well. So that in the first place only the \$5,838.88 was omitted through an oversight from the tabulation in Plaintiff's Exhibit 7; you remember that? [380] A. I believe so.

(Testimony of Sid E. Flaherty.)

Q. And as to all other amounts, those are what is shown on your books?

A. (Witness nodding in the affirmative.)

Q. All right. Now, directing your attention to the last page of Plaintiff's Exhibit 7, there the tabulation is headed "Employee Account," and various figures received by you as manager and Mr. Olson as fighter are then set forth, is that right? A. That's right.

Q. And those start with August 21, 1954, which, I think, was the Rocky Castellani fight here in San Francisco, the ring record shows.

A. I believe that is correct.

Q. This, then, evidences the salaries paid to you and Olson by the corporation under the arrangement Mr. Ellis just told us about?

A. That's right.

Q. Now, you also remember that on the deposition I asked you for the total purses which the corporation received for those fights and you gave those figures to Mr. Gallen?

A. My bookkeeper gave those figures.

Q. All right, your bookkeeper gave them?

A. That's right.

Mr. Clark: Will you accept, then, Mr. Ellis, subject to [381] correction, the following figures which Mr. Flaherty's bookkeeper furnished us as a result of the deposition—subject to correction.

Mr. Ellis: If that document has been introduced in evidence I don't see any reason for reading those off at the present time.

(Testimony of Sid E. Flaherty.)

Mr. Clark: I have no document to introduce in evidence. This is my own typewritten note on it.

The Court: He is not reading from an exhibit.

Mr. Clark: I am not reading from the exhibit. These are figures furnished——

The Court: Can you stipulate as to the total amount of the purses?

Mr. Clark: Subject to correction.

The Court: Since the formation of the corporation. That's right, is it?

Mr. Clark: Yes, subject to correction.

Mr. Ellis: I think that what we will do, we can stipulate and file the document with your Honor in regard to that. What I am objecting to is the disclosure of the various internal arrangements of this corporation. There has been nothing shown to tie this corporation, no case proved against this corporation. Why should its internal affairs now be made public?

The Court: All he is asking for is a stipulation as to [382] the total amount of the purses, that's all.

Mr. Clark: That's all.

The Court: That's a matter of record, anyway.

Mr. Clark: Yes, that's all it is, and these figures were furnished from Mr. Flaherty's bookkeeper.

The Court: Read them off.

Mr. Clark: Very well.

Mr. Ellis: May I ask Mr. Flaherty a question?

(Testimony of Sid E. Flaherty.)

Q. Were those figures prepared or entered by you, under your charge and control, or are they prepared by somebody else and kept by somebody else?

A. Kept by Mr. Spiess.

Q. (By Mr. Ellis): Do you know of your own knowledge about these figures?

Mr. Clark: You know what the total purses were.

The Court: Gentlemen, don't waste time on this. You can get those figures at the recess and file the paper that sets them forth.

Mr. Clark: There were only three of them, your Honor, and I can dispose of them in a minute.

The Court: They haven't got their records here, Mr. Clark, and you are reading from some figure that you got. They want to check them, anyway.

Mr. Clark: I got them on discovery.

Mr. Ellis: I will accept them subject to correction. [383]

The Court: All right, read them off.

Mr. Clark: All right.

Q. Then am I correct in stating, Mr. Flaherty, that for the Rocky Castellani fight on August 20, 1954, the gross purse was \$127,500, \$12,000 expenses, leaving a net purse of \$115,550.

For the Garth Panter fight at Richmond, California, November 3, 1954, the gross purse was \$8,827.78; expenses, \$577.78; net purse, \$8,250.00.

Pierre Langlois, San Francisco, on December 15, 1954, the gross purse was \$69,674.48; expenses, \$4,575.73; and the net purse was \$65,098.75.

(Testimony of Sid E. Flaherty.)

Now, am I correct in stating, Mr. Flaherty, that these three fights I have read to you, or the results of them, on August 20, 1954, with Castellani; on November 3, 1954, with Garth Panter; and on December 15, 1954, with Pierre Langlois, are the same fights represented by the items appearing on page 3 of Exhibit 7?

A. Yes, as long as the figures and dates correspond, they are.

Q. Well, the figures I have just read to you, subject to correction, represent the entire purse received by you and Olson, the entire purse paid to the corporation, and the figures on the third page of Plaintiff's Exhibit 7 represent the salaries, or portions of that received by you and Olson? [384]

A. I think that's right.

Q. Subject to correction.

A. That's right.

Q. You think that's right. Can you give us now, so we won't have to bother with any subsequent tabulation, the approximate amount of the total purse paid to the corporation, in round figures—just a minute—in round figures on account of Olson's share——

Mr. Ellis: May I have that last question?

The Court: He hasn't finished it.

Mr. Clark: I haven't finished it yet.

Q. (Continuing): ——for the Archie Moore fight in New York on June 22, 1955?

Mr. Ellis: What is the question?

Mr. Clark: The question is whether the witness

(Testimony of Sid E. Flaherty.)

can give us, in round figures, the total purse paid to the corporation on account of Olson's share.

Mr. Ellis: Just a minute, on account of——

Mr. Clark: Just a minute.

Mr. Ellis: You said on account of Olson's share. The testimony of mine, or rather my statement was that the purse belongs to the corporation.

Mr. Clark: All right, I will amend the question. I don't want to inquire into your corporation, Mr. Ellis.

Q. Can you give us, Mr. Flaherty, the total purse paid to [385] the corporation, Sid Flaherty Promotional Enterprises, from the Archie Moore fight in New York on June 22, 1955?

A. Offhand, no.

Q. You cannot? A. No.

Q. Not even in round figures?

A. I can explain why if you want to know.

Q. I don't think we are interested in that.

A. Then I can't answer it.

The Court: These figures are subject to ascertainment, aren't they?

Mr. Clark: Yes.

Mr. Ellis: All subject to ascertainment.

Mr. Clark: Then, Mr. Ellis——

The Court: We have been 15 minutes on this thing; I am not going to spend any more time on it now. That is something that can be arrived at by pretrial, and other methods, not going to have the witness guess at it.

Would you furnish the figures?

(Testimony of Sid E. Flaherty.)

Mr. Ellis: Surely.

Mr. Clark: That is just what I was going to ask the witness through your Honor.

Mr. Ellis, may we have furnished as part of plaintiff's case the purse paid the corporation from the Archie Moore fight on June 22, 1955, Jimmy Martinez, August 13, 1955, and [386] Joey Giambra, August 26, 1955, and the Sugar Ray Robinson fight last Friday. Those are the four fights, and except for those we have everything else in the record.

Mr. Ellis: I would like to make one observation. I have no objection to furnishing these, your Honor, provided, of course, No. 1, they prove a cause of action against the corporation. Otherwise they are not entitled to anything; or, provided that your Honor should decide they were entitled to an accounting.

The Court: Well, this doesn't involve any matter of accounting. Aren't these figures matters of public record in the Commissions?

Mr. Clark: Yes, they are public record in the Commissions.

The Court: The amount of the purse——

Mr. Ellis: You could find those out from the various Commissions where the fights took place.

The Court: I am not going to spend any more time if they are matters of public record. You are able to get them quicker than your opponent because you have dealings with the Commission, so furnish those figures.

(Testimony of Sid E. Flaherty.)

Mr. Ellis: I will furnish them.

Mr. Clark: Very well.

Q. Now, Mr. Flaherty, am I correct in stating that on June 15, 1954, Olson appeared against Jess Turner in Honolulu? [387]

A. Just about that time.

Q. Well, his ring record would show the exact date? A. Then it is right.

Q. All right. And am I correct in stating that Tommie Miles promoted that fight? A. No.

Q. Was Tommie Miles interested in the promotion of it? A. Yes.

Q. To your knowledge? A. Yes.

Q. And did he share in the profit, if any, made in that fight? A. Profit, it any? Yes.

Q. Very well. Now, also am I correct—Do you remember about what Olson's percentage was in that fight?

Let me call your attention to the return, or the report of the Territorial Boxing Commission concerning the receipts from the fight, which shows that Jess Turner received a net of \$4,850.

Mr. Ellis: Are you going to introduce that document?

Mr. Clark: Yes, I am, but just a minute, though.

Mr. Ellis: Otherwise I will object to any testimony from it.

Q. (By Mr. Clark): Bearing that figure in mind, can you tell us about what Olson's share of the purse would have been? [388]

(Testimony of Sid E. Flaherty.)

A. I don't remember the percentage we signed for the contract.

Q. Was it at least as much as Turner got?

A. No.

Q. Olson was the champion of the world at that time, wasn't he? A. That's true.

Q. Well, can you give us an approximation of what Olson's percentage was?

A. I will guess and say 20 per cent.

Q. 20 per cent? A. That's right.

Q. All right. Am I correct in stating that you and Olson waived his share of the purse in favor of the promoter?

A. In favor of the promoter? Yes.

Q. Very well.

Mr. Clark: Now, we will offer in evidence, may it please your Honor, a form of the Territorial Boxing Commission of Hawaii headed "Promoter Boxing Enterprises, Ltd., date June 15, 1954, place Honolulu Stadium," as plaintiff's exhibit next in order.

That's all Mr. Flaherty.

The Clerk: Plaintiff's Exhibit 37 introduced and filed into evidence.

(Whereupon form dated 6/15/54, was [389] received in evidence and marked Plaintiff's Exhibit No. 37.)

(Testimony of Sid E. Flaherty.)

Cross-Examination

By Mr. Ellis:

Q. Mr. Flaherty, with reference to the promoter of this Jess Turner fight, who was it?

A. The license belonged to a Mr. San Ichinose, if I recollect.

Q. Sam Ichinose? A. That's right.

Q. Who else was interested in it?

A. The Commission suggested that all three promoters be brought into the picture, Mr. Leo Leavitt, Tommie Miles and Mr. Ichinose, and I agreed.

Mr. Clark: And Mr. Miles, too.

Mr. Ellis: What was that last comment?

Mr. Clark: I said, "And Mr. Miles, too."

Mr. Ellis: He mentioned that..

Mr. Clark: I wasn't asking.

Q. (By Mr. Ellis): Ichinose and Mr. Leavitt and Mr. Miles, is that correct?

A. That is correct.

Q. And the Commission—speaking of what commission?

A. The Territorial Boxing Commission?

Q. Now, did you file a license for that fight in the Territory of Hawaii?

A. A license for the fight, or do you refer to a contract? [390]

Q. Did you file a license as manager?

A. Yes.

Q. In the Territory of Hawaii Boxing Commission? A. I did.

(Testimony of Sid E. Flaherty.)

Q. That was in June of 1954?

A. It was prior to the fight.

Q. Prior to the fight, but the fight, I believe the ring record shows that fight was—with Turner, was —Jess Turner, June 15.

Mr. Clark: 1954.

Mr. Ellis: June 15, 1954.

Q. So prior to that you filed a license as manager? A. That's true.

Q. It was accepted by the Commission, was it?

A. That's true.

Mr. Ellis: Have you seen this?

Mr. Clark: Let me see it and I will recognize it. Well, this is the record we got now.

Mr. Ellis: Yes.

Mr. Clark: Yes. No objection to that.

Q. (By Mr. Ellis): I show you a photostatic copy of an application for renewal of manager's license, fee \$25, Sidney E. Flaherty, and ask you whether that is your signature and you recognize that as the application you refer to?

A. That's right. [391]

Mr. Ellis: We offer this as defense exhibit next in order.

Mr. Clark: No objection.

The Clerk: Defendant's Exhibit E introduced and filed into evidence.

(Whereupon application for license renewal was received in evidence and marked Defendant's Exhibit E.)

(Testimony of Sid E. Flaherty.)

Q. (By Mr. Ellis): And you received a license as manager, did you not, on that application?

A. I did.

Q. That application for manager's license bears date received April 15, 1954, and date approved, April 19, 1954. I call that to your attention, Defense Exhibit E, upper right hand corner, is that right?

A. That's right.

Q. Now, did you also file a memorandum of agreement with respect to the Turner fight in Honolulu?

A. At that time?

Q. Says June 7, 1954.

A. Yes.

Mr. Ellis: We offer the memorandum of agreement dated June 7, 1954 between Sid E. Flaherty of San Francisco and Carl E. Olson, ring name Carl "Bobo" Olson, of San Francisco, next in order F, I believe. [392]

Mr. Clark: No objection.

The Clerk: Defendant's Exhibit F introduced and filed into evidence.

(Whereupon memorandum of agreement, 6/7/54, between Flaherty and Olson, was received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Ellis): That memorandum of agreement shows that it was filed June 7, 1954 and approved June 7, 1954 by the Territorial Commission of Hawaii, and it is signed by Sidney E. Flaherty. Is that your signature?

A. It is.

Q. And Carl E. Olson.

A. That's right.

(Testimony of Sid E. Flaherty.)

Q. Did Olson sign that in your presence?

A. Yes.

Q. And where was it signed?

A. The Commission office.

Q. Commission office in Honolulu?

A. The Commission office in Honolulu.

Q. That's the Armory building in Honolulu?

A. That's right.

Mr. Ellis: Now I offer next as a defense exhibit the minutes of a meeting of the Territorial Boxing Commission, Monday, June 7, 1954, 4:30 p.m., Honolulu Armory.

Mr. Clark: May I see those, please, Mr. Ellis?

Mr. Ellis: That is GG-1, I believe, in the deposition of Bobby Lee.

Mr. Clark: May we have a stipulation as to the capacity Mr. Miles was acting in at this Commission meeting?

Mr. Ellis: We will put Mr. Miles on later; I don't know.

Mr. Clark: Was he acting as promoter?

Mr. Ellis: I couldn't tell you.

Mr. Clark: I have no objection to that.

The Court: Let's get through with one thing at a time. Do you want to offer that? Is there any objection to that?

Mr. Clark: No objection to that, Your Honor.

The Court: May be admitted.

The Clerk: Defendant's Exhibit G introduced and filed into evidence.

(Testimony of Sid E. Flaherty.)

(Whereupon minutes of meeting, 6/7/54, Territorial Boxing Commission, were received in evidence and marked Defendant's Exhibit G.) [394]

* * *

Q. (By Mr. Ellis): Now Mr. Flaherty, did you ever employ [395] Mr. Miles to represent you in any capacity? A. Employ Mr. Miles?

Q. Yes. A. No.

Q. Did you ever in any way approach Carl Olson, or Bobo Olson, for the purpose of enticing him away from Herbert Campos? A. No.

Q. Did you ever offer Carl Olson any inducement of any kind to leave Herbert Campos?

A. No.

Q. Did you ever employ anyone for that purpose, to induce Carl Olson to leave Herbert Campos? A. No.

Q. When, if ever, did you learn about Exhibit B in this complaint, that so-called July 20, 1949 worldwide agreement?

A. I believe it was brought to my attention by Mr. Hewitt.

Q. By Mr. Hewitt. And when was that? Was that at the time that that compromise of settlement agreement was being effected?

A. At about that time.

The Court: You are talking about the agreement in the State Court now?

(Testimony of Sid E. Flaherty.)

Q. (By Mr. Ellis): The State Court action, complaint for money? [396]

A. That's right.

Q. And that was in 1952, was it not?

The Court: 1953.

A. I am not certain of the date.

The Court: 1953, according to my records.

Mr. Clark: The suit was filed, I think, on July 11, 1952 for the return of the personal loans, Your Honor. Then the other State Court action was filed in September of 1953.

Mr. Ellis: The State Court action September 1953, that I know.

Mr. Clark: September 11, 1953 the State Court action on the contract was filed, and prior——

The Court: That's the first I have heard of that.

Mr. Clark: Oh, no, the record is in evidence, Your Honor.

The Court: Isn't that the case that was settled?

Mr. Clark: No, sir, it is not.

The Court: You are referring now to Exhibit 25?

Mr. Ellis: Exhibit 25, yes, I am referring to that complaint for money, and it's Plaintiff's Exhibit 25.

Mr. Clark: That's right.

Mr. Ellis: And No. 431374 in the Superior Court, City and County of San Francisco.

Mr. Clark: That's right, that was brought on the 1949 contract and still remains pending.

Mr. Ellis: No, no, this isn't still pending——

(Testimony of Sid E. Flaherty.)

Mr. Clark: The September 11, 1953 one certainly does. September 11, 1953, No. 431374 is the State Court action that you came into.

Mr. Ellis: No, I didn't come into that.

Mr. Clark: Well, you entered into a stipulation.

Mr. Ellis: In regard to depositions.

Mr. Clark: That's right.

Mr. Ellis: I am looking for the one that was filed in 1952.

Mr. Clark: That was in July of 1952.

Mr. Ellis: That's the one I am interested in.

Mr. Clark: For the return of some of the personal loans.

Mr. Ellis: 431374, Your Honor, has not been settled. This one I am referring to as No. 419086, Campos versus Olson, et al., complaint for money, and in the Superior Court of the State of California, in and for the City and County of San Francisco, and the action is for \$9,342.49.

The Court: What is the exhibit number on that?

Mr. Ellis: That is Exhibit D, Defendant's Exhibit D.

The Court: Oh, that was settled on September 30, 1952.

Mr. Ellis: That is right.

Mr. Clark: That's right.

Mr. Ellis: Settled in 1952.

The Court: That's clear. Now, are they any other questions you want to ask? [398]

Q. (By Mr. Ellis): That, Mr. Flaherty, is about the time you first learned of the so-called 1949

(Testimony of Sid E. Flaherty.)

contract, is that correct? A. I believe so.

Q. From Mr. Hewitt. And was Mr. Hewitt representing you at that time in connection with the settlement of this matter? A. Yes.

Mr. Clark: Settlement of what matter?

Mr. Ellis: The one I am just talking about.

Mr. Clark: What, the loan suit?

Mr. Ellis: Yes.

That's all on the cross; I will recall him as my own witness.

Redirect Examination

(By Mr. Clark):

Q. Mr. Flaherty, did I understand you to say—Where is that exhibit, please. Mr. Ellis? What did you do with the file?

Mr. Ellis: It's there.

Q. (By Mr. Clark): Did I understand you to say that Fred Hewitt represented you, Mr. Sid Flaherty, in action No. 419086 being the suit against Bobo Olson for personal advances?

A. Well, you pinpoint it down. It was Bobo Olson who was with me at the time; he represented Bobo Olson.

Q. He represented Bobo Olson? [399]

A. That's right.

Q. Now, let me call your attention to the fact that this complaint is filed on behalf of Herbert Campos, by Mr. Hewitt, against Mr. Olson.

A. That's true.

Q. You realize that; is that right?

(Testimony of Sid E. Flaherty.)

A. That's right.

Q. Now, who, please, then, if Mr. Hewitt represented both parties to the action, who, please, is—well, his name doesn't appear on here. It does on some of the other papers in the action. Do you know a Mr. Holl, H-o-l-l?

A. Yes, I know Mr. Holl.

Q. Did he have anything to do with the representation of Bobo Olson in this suit?

A. Not at that time, no.

Q. Did he at any time?

A. The final payment only.

Q. With respect to the final payment. Didn't he, with respect to the satisfaction of judgment in the suit, represent Mr. Olson? A. No.

Q. He did not? A. No.

Mr. Clark: Just a minute, let me have the file.

Mr. Ellis: You understand what satisfaction of judgment [400] means?

The Court: Well, I know what the trouble is, you ask a layman a question about a legal document. His answer doesn't mean much to me. If he represented him in the payment of the money, then he represented him in connection with the satisfaction of the judgment, of course.

Mr. Clark: Just a minute. We have the file here, Your Honor; bear with us.

The Court: However, I don't see why you are spending a lot of time on this. The only question that arose was the time when the witness knew, for

(Testimony of Sid E. Flaherty.)

the first time, about the 1949 contract in Hawaii. He said "at this time." Now, you are getting into collateral matters. I don't see it makes any difference who represented him.

Mr. Clark: May it please Your Honor, I am not going to pursue it with this witness anyway, because it is his conclusion as to who represented who, and I doubt Mr. Flaherty is competent to tell us.

That's all from us, please.

The Court: All right.

(Witness excused.)

Mr. Clark: Now, may it please Your Honor, I'd like that to offer a very brief portion of the deposition of Robert M. Lee, who was secretary-administrator of the Territorial Boxing Commission of Hawaii, which deposition was taken by Mr. Ellis and myself in Honolulu on July 1, 2, and 10 of this [401] year. I will offer in evidence the portion beginning on page 197 at line 14 and reading as follows:

May I have the stipulation that Mr. Lee is down in Honolulu?

Mr. Ellis: Honolulu, yes.

Mr. Clark: The difference between the dates on which this deposition was taken, Your Honor, accounted for not being able to get Mr. Lee back from skin-diving for fish. We had the Marshal almost after him.

DEPOSITION OF ROBERT M. LEE

“Q. Do you remember whether or not Mr. Flaherty on behalf of himself and Olson waived any payment of proceeds from that fight?”

And we are talking about the Jess Turner fight on June 15, 1954.

“A. Mr. Flaherty waived any payment of proceeds on that fight on the money earned by Olson but did not waive on the money earned by another fighter he had on that same program, namely, William ‘Bull’ Halsey, ‘Bull’ Halsey they called him.

Q. So far as Olson is concerned, he did waive any proceeds payable to either Olson or himself from that fight? A. Yes, sir. [402]

Q. And to whom did that money go, if you know? A. To the promoter.

Q. And who was the promoter?

A. The promoter at that time was Boxing Enterprises, Ltd.

Q. And was Mr. Miles part of that proposition?

A. He was but not officially as far as the Territorial Boxing Commission is concerned.

Q. Well, do you know of your own knowledge that he participated in the promotion of that fight?

A. He did, very, very much so.”

Ending at line 10, page 198.

Now, in closing, Your Honor, we will offer the entire deposition of the defendant Carl Olson in evidence.

The Court: Well, how long is that?

Mr. Clark: Well, we have it right here.

The Court: That's the discovery?

Mr. Clark: I am not going to read it.

The Court: Well, you had him on the witness stand.

Mr. Clark: Well, I only touched parts of it. My only purpose in offering it is to show the relationships in '46 and '47 between Leavitt, Lipton, and concerning which Mr. Flaherty testified. That is my purpose.

Mr. Ellis: I object to the introduction of that deposition in regard to anything in '45, '46, '47; have no [403] objection to anything from '48 on when Mr. Olson was under the management of Mr. Campos, or for the period of time he was under his management.

The Court: Well, counsel, if you offer this in evidence and it is admitted, that means I have to read 67 pages of testimony. I don't want to do that.

Mr. Clark: May it please Your Honor, I will then make an offer of proof and ask Your Honor to rule on it, and if you rule with me I can read the very few pages of this deposition.

We propose to prove by this deposition that originally, as the record shows, Olson was under a contract to a man named Lipton on a 50 per cent contract for fourteen years, and that Lipton turned him over to Flaherty here in San Francisco when Olson was only 17; that in February of 1946, approximately, the State Athletic Commission learned that Olson was under age in fighting and forbade him to fight further, and he thereupon went

back to Hawaii and he is still in Hawaii, fought under the Lipton contract but the financial affairs were managed by a promoter named Leo Leavitt. In other words, Lipton then turned him over to Leavitt.

Now, he fought under Leavitt until February of 1947 when he signed with Charles W. Miller, and I have a stipulation covering that. That's all I want. I want to show the [404] association of Leavitt, Lipton and Mr. Flaherty told us about his part and Miles concerning Olson from the very start.

The Court: Well, I don't see the materiality.

Mr. Clark: Very well, I will submit it for a ruling.

The Court: Is counsel's statement substantially correct?

Mr. Ellis: His statement is substantially correct, but it doesn't retrieve the information which he has stated to Your Honor as a part of this case, what he did prior to the time——

The Court: I am inclined to fully agree with that, but if it is innocuous because of its immateriality, why, no great harm can come from admitting it. In other words, the Court might commit error in admitting in evidence a stipulation that the sun rose in Hawaii on such and such a date. But I don't see any point of wasting a lot of time arguing about the materiality of an innocuous matter.

Mr. Ellis: I just add my objection for the purpose of the record, Your Honor.

The Court: Subject to its materiality you agree that the statement is correct?

Mr. Ellis: That is correct.

The Court: Subject to your objection?

Mr. Ellis: Yes.

Mr. Clark: Yes. [405]

The Court: Very well, I will allow it to remain in.

Mr. Clark: Then may my statement be taken as the evidence instead of reading the deposition?

The plaintiff rests, Your Honor.

The Court: Very well. [406]

* * *

Mr. Ellis: The defendants will call Mr. James Spagnola as the first witness.

JAMES A. SPAGNOLA

called as a witness by the defendants; sworn.

The Clerk: Please state your name to the court.

The Witness: My name is James A. Spagnola.

Direct Examination

By Mr. Ellis:

Q. Where do you live, Mr. Spagnola?

A. Honolulu, sir.

Q. And the address?

A. 1749 Molonai Street.

Q. What is your occupation?

A. I'm a bowling alley manager.

Q. What have you been prior to that?

A. I served twenty-one years in the United

(Testimony of James A. Spagnola.)

States Navy, and I worked eleven years at the Naval shipyard at Pearl Harbor.

Q. During what period of time did you work at Pearl Harbor?

A. I worked at Pearl Harbor from 1939 to 1949.

Q. How long have you been a resident of Honolulu? A. Since 1930.

Q. Mr. Spagnola, have you been connected with boxing in any capacity in Honolulu?

A. Yes, I have. [439]

Q. In what connection? A. As a manager.

Q. Have you been licensed under the Commission? A. I have, yes, sir.

Q. For what period of time?

A. I was licensed as a manager in 1949.

Q. 1929? A. 1949.

Q. 1949. How long were you licensed down there as manager?

A. I have been licensed ever since, sir, since 1949 to this day.

Q. Are you licensed anywhere else, on the mainland? A. Not at present, sir; no, sir.

Q. Have you been? A. Yes, sir.

Q. Where? A. California and Illinois.

Q. What occupation, or what are you engaged in at the present time besides the bowling alley you mentioned?

A. Well, I manage several fighters.

Q. I see. Are you presently a member of the Federal Grand Jury?

(Testimony of James A. Spagnola.)

A. I am at the present time. I was excused to come here to be your witness.

Q. Do you know Mr. Carl "Bobo" Olson? [440]

A. I do.

Q. How long have you known him?

A. Oh, known him real well since about 1946.

Q. Do you know the plaintiff in this action, Mr. Campos? A. I do.

Q. How long have you known him, Mr. Campos?

A. I have known Mr. Campos approximately six years.

Q. What connection have you had with Mr. Olson, if any?

A. Well, with Mr. Olson, my son and he were very good friends, and he was like a son to me. He used to come to my house and he was welcome at any time, and I regarded him just like my own son.

Q. Did you have any official connection with him in connection with boxing? A. I did, yes, sir.

Q. What was it? A. I was his agent.

Q. Will you explain that?

A. Well, I could narrate it; I can't answer it in one sentence.

Q. What did you do for him; what were your duties? A. My duties as his agent?

Q. Yes.

A. Was to procure matches for him and investigate and see if the matches were O.K., and so that he could make some [441] money, and also to take care of his correspondence and keep him informed on matters that were going on.

(Testimony of James A. Spagnola.)

Q. Then you acted as his secretary?

A. Actually, yes, sir.

Q. In that connection what did you do, write letters for him? A. I did, yes, sir.

Q. Did you also accompany him from time to time to meetings with the Boxing Commission?

A. I did, yes, sir.

Q. Now, getting down to the Boxing Commission meetings of June, 1951, back to the year 1951, do you recollect attending any meetings of the Boxing Commission in June of 1951 with Mr. Olson?

A. I do.

Q. At what time; what meetings?

A. I attended a meeting of June 18, I believe, and I presented a letter in longhand written by me to the Commission stating the finances of Mr. Olson and the hardships that were caused to his family, and that we were to request—we requested the commission for permission for Carl to go elsewhere and seek employment in the only trade that he had, and that was in boxing.

Q. Who was present at that meeting, if you recall?

A. Well, there was the Chairman, Dr. Withington, there was Arthur Stagbar, Leon Sterling, Donovan Flint and Bobby Lee, [442] Secretary-Administrator and Sharkey Wright, who trained Olson, and one other Commissioner, I believe.

Q. Was that Dowsett?

A. Yes, sir, Mr. Dowsett.

Q. Was Mr. Campos at that meeting?

(Testimony of James A. Spagnola.)

A. He was not.

Q. What is your recollection, what is your best recollection as to what the Commission did with reference to your letter of—on behalf of Olson?

A. Well, Dr. Withington read it, asked the pleasure—passed it around to the commissioners and then he asked their pleasure, and then he rescinded that and said, “I believe that we shouldn’t take any action on this in fairness to Mr. Campos; he should be present.” So they called for a special meeting for the following day.

Q. June 19th? A. Yes, sir.

Q. All right. Now, did you attend that meeting on June 19th? A. I did.

Q. Can you tell us who was present?

A. At that meeting Dr. Withington was there, Arthur Stagbar was there, Donovan Flint was there; there was one Commissioner missing, I believe it was either Dowsett or Sterling; I am not sure.

Q. It is your recollection there were four Commissioners [443] there? A. Yes, sir.

Q. Was Bobby Lee there?

A. Bobby Lee was there, the newspaper writer was there, Andrew Mitsukado of the Honolulu Advertiser, and Mr. Campos.

Q. Was Olson there?

A. Olson was there, yes, sir.

Q. Do you recall whether there was a Mr. Miles there? A. I believe Mr. Miles was there.

Q. What was said and done at that meeting by

(Testimony of James A. Spagnola.)

you or by Mr. Olson and by the Commission, or by any member of the Commission?

A. Well, at that meeting I didn't get up to speak because they had my letter from the previous day. But Carl got up and spoke in his own behalf, and then he retired, and then the Chairman——

Q. Wait a minute. What did he say?

A. Well, he stressed that he was having hardships, no fights, and his family was in distress, and that he would like to go elsewhere and seek fights that would give him some remuneration.

Q. Did I understand you to say you did not speak at that time? A. No, I did not.

Q. Now, what did Mr. Campos say, if anything?

A. Well, I believe Mr. Campos didn't say anything until the Chairman said something.

Q. What did the Chairman say? [444]

A. The Chairman of the commission then notified Mr. Campos, who was sitting at the end of the table, that would he in any way—would he be willing to let Carl go elsewhere to fight, and Mr. Campos said—I believe the Chairman also said, would he stop him in any way from trying to make a living and make money for his family. And at that time Mr. Campos, I recollect, said that he would not stand in Carl's way in any manner, he could go anywhere he wanted to seek employment, and that was it. That's all that was said.

Q. Nothing else was said? A. No, sir.

Q. What did the Commission do then?

A. Well, I left—Carl and I left; I don't know

(Testimony of James A. Spagnola.)

what they did. The meeting was adjourned, I believe, and I left.

Q. The meeting was adjourned and you left?

A. Yes, sir.

Q. In other words, the Chairman adjourned the meeting and you left? A. Yes, sir.

Q. Mr. Spagnola, did you have any conference or conversation with Mr. Campos at or about May—April or May of 1951 in connection with his claims against Mr. Olson and the sale of Olson?

A. I did.

Q. About when; can you establish that? [445]

A. It was after the Lloyd Marshall fight. The Lloyd Marshall fight, as I recollect, was on May 7th, and possibly three or four days later he said that he would——

Q. Where did that take place?

A. Down at his ranch. Well, he called me first and asked me if I had any word from the Mainland on the sale of Olson, and I told him yes. So he said, “Well, you and Carl come down.” So we went down to his office in Kailua, and I had a wire from the States in which I was offered \$3,000 for Olson’s services, and Mr. Campos at that time——

Q. Did you convey that to Mr. Campos?

A. Yes, I did, and he said no. He studied a while, he said, “No, I want what the boy I think owes me and that’s about \$7,500.”

So I left then and I in turn let the people on the Mainland know what——

(Testimony of James A. Spagnola.)

The Court: He is going beyond the question.

Mr. Ellis: He is going beyond my question.

Q. How did you ascertain that Olson was for sale?

A. Well, it was in the newspaper and it was common knowledge all around the town.

Q. In the newspaper? A. Yes, sir.

Q. What newspaper did you see it in?

A. It was in the Honolulu Advertiser. [446]

Q. At or about the time you are speaking of, May, 1951? A. Yes, sir.

Q. Now, you state that the offer of \$3,000 for Mr. Olson was rejected? A. Yes, sir.

Q. Mr. Campos stated that he wanted \$7,500?

The Court: You are going over something now he has already answered.

Q. (By Mr. Ellis): Now, Mr. Spagnola, did you at any time arrange for any fights for Bobo Olson? A. I did.

Q. Which ones?

A. I was instrumental and arranged for the Dave Sands fight in Australia.

The Court: Now, this is all past history too; what is the materiality of this?

Mr. Ellis: It's to show lack of performance, failure of performance on the part of Mr. Campos and also in rebuttal of Mr. Campos' testimony as I went through each one of those fights that were fought by Olson; he claimed he arranged all those fights. This is rebuttal, and also to show failure of performance,

(Testimony of James A. Spagnola.)

one of the special defenses. That's the only purpose of it, Your Honor. Only be a couple of questions.

The Court: All right.

Q. (By Mr. Ellis): You stated, I believe, you had arranged [447] the Sands fight. Where was that? Sydney?

A. Sydney, Australia, yes, sir.

Q. Did you go down there? A. Yes, sir.

Q. Did you get paid a portion of that purse?

A. I did.

Q. What portion?

A. I got my 10 per cent.

Q. From whom did you get it?

A. From Carl.

Q. What other fights did you have any part in?

A. Well, I arranged for a Sugar Ray Robinson fight in Chicago with a promoter in Chicago for August 16th of 1950. I had the contracts, signed contract by the promoter, and I called Mr. Campos from California here at Los Gatos and told him what I had, and he told me to—that he would not—I asked him for the power of attorney to sign these contracts and return them to the promoter because of Robinson's inability at that time to sign for a fight in Illinois as he was not world's champion throughout the world, he was only the middleweight champion in Pennsylvania at that time. But the promoter, Fred Irwin—

The Court: Well, now, that is also going beyond the scope.

Mr. Ellis: All right. [448]

(Testimony of James A. Spagnola.)

Q. (By Mr. Ellis): You had something to do with the original arrangements——

A. Yes, sir.

Q. ——for the Robinson fight?

A. Yes, sir.

Q. What happened to the contract that you submitted to Mr. Campos?

A. I flew out to Honolulu for Mr. Campos to sign them and Carl Olson and Sharkey Wright were witnesses to that effect, and he signed them and I airmailed, registered air mail and sent them back to Mr. Irwin in Chicago. And I had to fly back here to California——

Q. That's outside the scope of the question. Was there any other fight you arranged?

A. No, there was no other fight that I arranged. I helped on all of them as much as I could as Carl's agent.

The Court: Well, that is also beyond the scope of the question.

Mr. Ellis: One final question.

Q. Do you know whether Carl Olson was rated in the Ring Book for the year 1951?

A. Carl Olson in 1951 was not rated, no, sir.

Q. And in 1950? A. 1950? No, sir.

Mr. Ellis: That's all. [449]

(Testimony of James A. Spagnola.)

Cross-Examination

By Mr. Clark:

Q. Mr. Spagnola, who was it on the mainland you were representing in attempting to buy Campos' contract in the year of 1951?

A. It was for Mr. Jackie King, sir.

Q. For Mr. Jackie King?

A. King, promoter from Sacramento.

Q. It was not for Mr. Flaherty, I take it?

A. No, sir.

Q. All right. Now, this meeting of June 19th of 1951, before the Commission, which you recollect, can you tell me how you arrived at the date June 19th?

A. Well, I have the minutes and I read the minutes of the meeting and I remembered the dates.

Q. I see. Now, in that connection let me show you a copy of the minutes of June 19, 1951, and I will ask whether those are the minutes you looked at to fix the date in your mind as to when this last meeting took place? A. Yes.

Q. These are the ones, are they?

A. Yes, sir, they are.

Q. Of course, you looked at these minutes in preparation for your testimony here?

A. Yes, sir.

Q. You went through the minutes and talked to Mr. Ellis [450] about it? A. Yes, sir.

Q. Right. Now, am I correct in stating, then, Mr. Spagnola, that the meeting you're telling us

(Testimony of James A. Spagnola.)

about is the same meeting at which the Chuck Hunter contract was finally cancelled, that is, the contract for Olson to fight Chuck Hunter; you remember that, don't you?

A. Yes, I believe it was.

Q. Well, take a look at the minutes that you are using to fix the date.

Mr. Ellis: What is the date of those minutes?

Mr. Clark: June 19th.

A. Oh, June 19th? Yeah, that's right. I believe they were; yes, sir.

Q. (By Mr. Clark): You told us on your direct examination that this meeting which you testified to was on June 19, 1951, didn't you?

A. Yes, sir.

Q. And you just told us that you fixed that date by having examined the minutes of the Commission for that day, isn't that right?

A. Yes, sir.

Q. These minutes I have shown you, Plaintiff's Exhibit 18, are the ones you examined, isn't that right?

A. No. [451]

Mr. Ellis: He has testified the minutes of June 18th——

The Witness: 18th.

Mr. Ellis: ——and they put it over one day.

The Witness: 18th.

Mr. Clark: Oh, I see. Let's get the minutes of June 18th. I misunderstood you.

The Witness: I am sorry.

Q. (By Mr. Clark): It was the first meeting you attended that was on June 18th.

A. That's right.

(Testimony of James A. Spagnola.)

Q. And you're able to remember that date because of some minutes you looked at?

A. That's right.

Q. Well, let me show you Plaintiff's Exhibit 17, then, which are the minutes of the Territorial Commission for June 18th. I will ask you whether or not those are the minutes you used to fix the date.

The Court: I don't see why either of you have been wasting time on this matter, because there's no disagreement; there was a meeting in which these conversations took place.

Mr. Clark: Well, I am entitled to test this witness' credibility as to his version as to what happened, Your Honor.

The Witness: These are not the minutes. These are not the minutes, because in the minutes of the 18th it started [452] off with a request by Carl Olson. These are not the same minutes.

Q. (By Mr. Clark): Are you telling us you have seen other minutes of the Territorial Boxing Commission relating to this matter which are dated June 18, 1951? A. Evidently so.

Q. Where did you examine those?

A. At the Commission.

Mr. Clark: Will you stipulate, Mr. Ellis, that the exhibit, Plaintiff's Exhibit 17, are the only minutes for June 18, 1951, appearing in the Commission Minute Book?

Mr. Ellis: The only minutes that you and I found down there.

Mr. Clark: And they were consecutively bound, weren't they?

(Testimony of James A. Spagnola.)

Mr. Ellis: That's right.

Mr. Clark: Yes, that is right.

Q. Now, at any rate, it is your recollection that at the meeting of June 18 the matter was continued until the following day by the Commission in order to get Mr. Campos there, is that right?

A. Yes, sir.

Q. Now, let me show you the Commission minutes for the following day, June 19, 1951, and I want to call your attention to the fact that it is recited there, and in fact all the [453] minutes say is that with the consent of the principals involved in the July 3rd bout, the Commission approved the request of the promoter Lau Ah Chew to cancel the July 3rd show, Carl Olson vs. Chuck Hunter. You remember that happening at this meeting on June 19th?

A. Now that it is brought to my mind, no.

Q. You do not?

A. No, the minutes that I read did not have that in there.

Q. Even the minutes for June 19th didn't have it?

A. Yes, sir.

Mr. Clark: Will you give me the same stipulation, Mr. Ellis, that these minutes, Plaintiff's Exhibit 18, are the only ones appearing in the minute book for June 19th?

Mr. Ellis: Are you seeking to confuse this witness by the fact that you and I both know that there was an unreported meeting on the 19th?

(Testimony of James A. Spagnola.)

Mr. Clark: Oh, no, no, no, I am not seeking to confuse him at all, except to test the credibility of his testimony about these dates he is talking about.

Mr. Ellis: He is talking about the informal meeting of the Commissioners there at noon on the 19th at which this matter was discussed and at which meeting Mr. Olson made certain statements and Mr. Campos made certain statements. Now, he is not talking about the regular formal meetings, nor has any other witness been talking about them. [454]

Mr. Clark: All right, Your Honor, after Mr. Ellis has, of course, the chance to warn the witness, let me ask you again, Mr. Spagnola:

Q. Did I understand you correctly a moment ago to say that you had seen other minutes for June 19th than those I show you, Plaintiff's Exhibit 18?

A. I have them in my hotel.

Q. You have copies of them in your hotel?

A. Yes, sir.

Q. Well, after you get off the stand will you please go to your hotel and produce them?

A. Yes.

Q. And the thing I am talking about are Commission minutes for June 19th, 1951. I want you to understand that.

A. They are not in the same form, sir.

Q. I don't care what form they are in.

A. They were typed; they were minutes typed by the secretary of the Commission.

(Testimony of James A. Spagnola.)

Q. They are typed minutes of a meeting held by the Territorial Boxing Commission?

A. 18th and 19th, yes, sir.

Q. On the 18th and 19th; and are they signed by the Secretary?

A. The whole minutes that I received from them were signed.

Q. And were they approved by the Commission?

A. They are not in official form, no, sir. [455]

Q. Are they records of the Commission?

A. Yes, sir.

The Court: He is trying to tell you he got a statement.

The Witness: I got them—a copy.

The Court: A copy of the minutes.

Mr. Clark: I don't know whether they are simply a statement by the Secretary, Your Honor, or whether a copy of an official record.

The Witness: That I wouldn't know. They typed them for me on paper in duplicate, and I have them.

Q. (By Mr. Clark): All right. Mr. Spagnola, at any rate, at the meeting you attended on June 19, 1951, you don't remember anything about the cancellation of the Chuck Hunter fight?

A. No, I don't recollect that, no, sir.

Q. Let's see what you recollect about people present on June 19th. I think you said you had some doubt about Commissioner Dowsett being there?

A. Yes.

Mr. Ellis: He said one of them.

(Testimony of James A. Spagnola.)

The Witness: One of them; I didn't know which one.

Q. (By Mr. Clark): Well, in that connection, in order to refresh your recollection let me direct your attention to the minutes I have shown you of June 19th, Plaintiff's Exhibit 18, and to the statement there that absent is Sherman N. Dowsett (Duty). [456]

Does that help you in remembering whether or not Dowsett was at the meeting you attended?

A. He wasn't at the meeting that I attended.

Q. He was not at the meeting you attended?

A. No, sir.

Q. And we are talking about this meeting of June 19th? A. Yes, sir.

Q. 1951. Thank you. Now, I think you told us, Mr. Spagnola, that during this time you were acting as the Financial Secretary, or Secretary for Carl Olson? A. Yes, sir.

Q. In that capacity you were attending to his correspondence? A. Yes, sir.

Q. Were you advising him too with respect to what he ought to do so far as the boxing game was concerned? A. Well, yes, I was.

Q. Let me show you a letter dated June 13, 1951, Plaintiff's Exhibit 35 in this case, in typing, and signed "Carl Olson." I will ask you whether or not you prepared that letter?

A. (Reading letter to self.) I did not.

Q. You did not?

(Testimony of James A. Spagnola.)

A. No, sir, I wrote a letter in longhand, sir; my letter in longhand, I couldn't find it at the Commission either.

Q. Well, we couldn't find it, either, Mr. Spagnola; at least we never found a longhand letter in the Commission [457] files. But did you have any knowledge on or about June 13, 1951, that Carl Olson had delivered this letter which I show you——

A. No, I didn't.

Q. ——which someone typed for him and signed, signed by him, to the Commission?

A. No, I did not.

Q. At that time were you aware of any commitments Mr. Olson had with Mr. Flaherty in California?

A. No, sir.

Q. You were not?

A. No, sir.

Mr. Clark: That's all.

Mr. Ellis: That's all.

Still want him to get that——

Mr. Clark: Not concerned with that, Your Honor.

The Court: All right.

Mr. Clark: I am sure if there had been any official minutes, Your Honor, we would have found them down there.

Mr. Ellis: We did find out that somebody by the name of Dempsey had taken a transcript of that informal meeting, but Mr. Lee told us in his deposition that the reporter's books were destroyed.

Mr. Clark: That's right; he didn't know whether she had taken notes of this particular meeting or

not, because she [458] sometimes did, and we searched the files very thoroughly.

(Witness excused.) [458A]

Mr. Ellis: Mr. Flint.

JOHN DONOVAN FLINT

called as a witness by the Defendants; sworn.

The Clerk: Please state your name to the Court.

The Witness: My name is John Donovan Flint.

Direct Examination

By Mr. Ellis:

Q. Mr. Flint, where do you reside?

A. I reside in Honolulu, Territory of Hawaii.

Q. And the address?

A. My home address is 140 South Kalaheo, Lanikai, Kailua, Honolulu, Oahu.

Q. What is your occupation or profession?

A. I am an attorney at law and a business man.

Q. How long have you been a resident of Honolulu?

A. Since December, 1920.

Q. Where did you go to school?

A. I have an AB Degree from Stanford University and a JD Degree from Stanford University, January 1, 1918.

Q. You have been practicing law for how long?

A. I was admitted to practice law in California in 1918, and I was admitted to practice law in Hawaii in 1920, December.

Q. You have been practicing there ever since?

A. What, sir?

(Testimony of John Donovan Flint.)

Q. You have been practicing there ever since?

A. I have been practicing law in Honolulu since 1920, [459] December, 1920, and admitted to practice law in January of 1921; get that right.

Q. You know the plaintiff in this section, Herbert Campos? A. What, sir?

Q. Herbert Campos, do you know him?

A. I know him, yes.

Q. How long have you known him?

A. Oh, I have known who the Campos family was for twenty years. I do not believe I knew who Herbert Campos was personally until about 1950.

Q. Have you had any connection with boxing in the Territory of Hawaii? A. I have.

Q. What connection?

A. Well, it is a long story. When I arrived——

The Court: Let's not have a long story. Ask the next question.

Q. (By Mr. Ellis): Just state when you first became connected with the Commission?

A. In 1928 I wrote the law that went through Congress allowing boxing in the Territory of Hawaii. I then wrote—when Congress allowed boxing I wrote the law that went into the operation in the Territory of Hawaii in 1929, I wrote the rules the Boxing Commission acted under, and later on in 1935 I was Chairman of the Boxing Commission for [460] eight and a half years, and then I quit to go in the navy in 1942, and I was reappointed to the Boxing Commission in 1949, as a member, and served five years.

(Testimony of John Donovan Flint.)

Q. All during the period 1949 or five years thereafter you were a member of the Commission?

A. I was a member of the Commission.

Q. You were, of course, a member of the Commission during the year 1951? A. Yes, sir.

Q. Now, Mr. Flint, referring to meetings of the Boxing Commission in Hawaii in June of 1951, I call your attention to Plaintiff's Exhibit 17 and Plaintiff's Exhibit 18, being respectively the minutes for June 18, 1951, which shows the meeting was held at 4:30 p.m., and the minutes of a meeting for June 19, 1951, the following day, at 12:15 p.m., ask you to examine both of those.

A. Yes, I recognize those as minutes of the Boxing Commission, meetings which I attended.

Q. You attended those meetings? A. Yes.

Q. And those minutes on the 18th show Withington, Flint, Stagbar, Dowsett and Lee present, with Leon K. Sterling absent (Duty); and the one on the 19th shows Withington, Flint, Sterling, Stagbar and Lee present, with the notation "Absent Dowsett (Duty)." [461] A. Yes.

Q. Now, do you have at the present time any recollection of the meeting of June 18, 1951?

A. I have.

Q. Will you tell me what was said and done at that meeting to the best of your recollection in relation to the Campos-Olson matter?

A. Well, I remember there was a dispute between Campos and Olson, and it came up at several meetings, and as I remember it now, after refresh-

(Testimony of John Donovan Flint.)

ing my recollection from that meeting, that Campos or somebody wasn't present, so they put it over to the next day, and on the 19th we had another meeting and——

Q. May I interrupt you there. Was that a meeting, an official meeting at which this was discussed, or was it one of those informal executive huddles?

A. No, on January (sic) 18th there was a regular meeting, as I remember it, and on January 19th (sic) was a regular meeting, as I remember it. Then we had a so-called executive session. That was the bright idea of——

The Court: All right.

Mr. Ellis: Never mind about whose idea it was.

The Court: What happened at the executive meeting?

The Witness: Well, that was a meeting that was called just to consider just one special thing.

The Court: Just tell us what happened. [462]

The Witness: Pardon me. That was a meeting to consider the dispute between Olson and his manager, Mr. Campos.

Q. (By Mr. Ellis): What was said by anyone at that meeting in relation to that matter?

A. Well, I remember Bobo Olson stating that he was not able to earn a living in the Territory of Hawaii as a boxer and that he was desirous of leaving there for other fields.

I remember Mr. Campos stating that Bobo Olson owed him some money, and then I also remember

(Testimony of John Donovan Flint.)

Mr. Campos stating that he would not stand in the way of Bobo making a living for himself and family, but that he wanted back the money that Bobo owed him from advances and different things, from money borrowed. And that is what I remember about the meeting.

Q. Do you remember any statement by Mr. Campos that Olson might go to the mainland?

A. He stated that he did not care where Olson, or Mr. Olson went, as long as he got paid the money he was owed, and he would not stand in the way of Olson making a living.

Q. Was that all, approximately, to your recollection, that took place at that meeting?

A. That meeting was a very short meeting.

The Court: No, he wanted to know if that was your recollection.

The Witness: That is all I remember of the meeting, I [463] remember the people present, but **that's all.**

Q. (By Mr. Ellis): Do you remember Mr. Spagnola being present? A. I do.

Q. Do you recall whether a Mr. Miles was there?

A. It is my memory that Mr. Miles was present at the present time.

Q. The meeting was held, the 19th meeting, it was held at 12:15; that is your recollection, it was a noontime meeting?

A. It was a noontime meeting, which is my recollection, yes.

Q. You recollect Sherman N. Dowsett was there

(Testimony of John Donovan Flint.)

at the special meeting? I am not talking about the regular meeting; talking about this meeting at which the parties met to discuss only one thing, the Campos-Olson dispute.

A. I do not remember whether Sherman Dowsett was there or not, but he was there at that meeting——

The Court: Well, you have answered the question.

The Witness: I do not remember definitely whether he was there or not. I might state that I'm a lawyer and lawyers are prone to talk too much.

Mr. Clark: We all know that and agree. His Honor agrees with you, anyway.

The Court: Sometimes, not always.

The Witness: I am also a member of this court; I think I was admitted to practice in this court. [464]

The Court: Is that all you want, Mr. Ellis?

Mr. Ellis: Just a second. That's all.

Cross-Examination

By Mr. Clark:

Q. Mr. Flint—— A. Yes, sir.

Q. ——you are fairly sure, are you not, that the last meeting you have been telling us about occurred on June 19, 1951, after having examined the minutes? A. Yes, I am; yes.

Q. Is it your recollection that was immediately after the action taken by the Committee on the cancellation of this Chuck Hunter fight?

(Testimony of John Donovan Flint.)

A. That is my memory, yes.

Q. Very well. Now, let me show you the minutes of a meeting of the Commission held on July 2, 1951, which was a Monday. A. Yes.

Q. At 4:30 p.m., which is Plaintiff's Exhibit 33 in this case, and I will direct your attention to the fact that your presence is noted there, J. Donovan Flint, among those present. There is no question; I just wanted to show you that.

A. I remember that.

Q. You remember that meeting? A. Yes.

Q. Now, I would like to direct your attention to the portion of the minutes reading as follows: [465]

(Reading.)

“Herbert Campos. The Commission received a letter from Herbert Campos, manager of boxer Carl Olson, asking their assistance in acquiring his share of Olson's purse. Olson left for the Mainland without Campos knowledge and was scheduled to box Chuck Hunter in San Francisco on July 9.”

That part is in parens, in brackets.

“The above letter was ordered placed on file. The secretary was instructed to advise Campos to write to the California Commission asking them to withhold—the secretary was instructed to advise Campos to write to the California Commission asking them to withhold his share of Olson's purse or to get an injunction against Olson.”

Now, do you remember the discussion among the Commissioners which is recorded by those minutes?

(Testimony of John Donovan Flint.)

Mr. Ellis: Just a minute before you answer, Mr. Flint. I believe, in line with expediting matters, I interviewed this witness and interrogated him only on one thing, and that was the minutes of the 18th and 19th. Anything else would be beyond the scope of the direct examination.

Mr. Clark: This bears on the credibility of his testimony as to what happened on June 19th, your Honor.

The Court: No, I will sustain the objection to it as [466] beyond the scope of the direct examination; make him your own witness, if you choose.

Mr. Clark: May it please your Honor, this goes only to the verity of his testimony as to what happened at the June 19 meeting for which he was called on direct examination. I have the right to show that an action taken later is inconsistent with what this witness has told your Honor.

The Court: That could be.

Mr. Clark: That is my theory.

The Court: Still wouldn't be within the scope of the direct examination.

Mr. Clark: May it please your Honor, if on direct examination someone testifies to a fact I am entitled to some latitude on cross-examination by calling attention to other events to test his credibility on that.

The Court: Well, you can examine him on it, because you could make him your own witness.

Mr. Clark: Very well, your Honor.

Q. My question is, Mr. Flint, was there discus-

(Testimony of John Donovan Flint.)

sion among the Commissioners which led to the instruction to the secretary to advise Campos to write to the California Commission asking them to withhold his share of Olson's purse or get an injunction against Olson?

Mr. Ellis: Have you shown who was present and——

Mr. Clark: The exhibit shows. [467]

Mr. Ellis: Mr. Olson was not present, it is inadmissible as hearsay, as far as that is concerned; a further objection.

Mr. Clark: It still goes only to this witness' testimony as to what happened at the prior meeting, your Honor. I don't care a thing about Olson being present.

The Court: I will allow it. Go ahead.

Mr. Clark: May I have the question read?

(Record read.)

A. I remember no discussion. I do remember at the meeting of the 19th, or whatever date it was, that there was no mention made at that meeting of withholding any purses or any one-third commission. All that Mr. Campos wanted was the money back that he owed him. I do not remember the secretary ever being instructed in that manner, but if it's part of the minutes, he must have been; but I remember nothing up until this date of July 2nd of Mr. Campos ever asking anything about his one-third commission. All it was was the money he owed him.

(Testimony of John Donovan Flint.)

Q. Mr. Flint, just bear with me a moment. Are you telling us that the minutes of July 2, 1951, misstate what happened at the July 2nd meeting by stating, "The secretary was instructed to advise Campos to write to the California Commission asking them to withhold his share of Olson's purse, or to get an injunction against Olson"?

A. Absolutely not. [468]

Q. Well, did it happen?

A. The minutes stand as written, and I was there, and I said I have no independent recollection of that particular order, but that was in the minutes and therefore it's there, and I was one of the secretaries, but I say that is the first time that I have ever heard of any—up to that time—of Mr. Campos ever wanting any one-third. That's what I am trying to say.

Q. The secretary was so instructed?

A. Oh, absolutely; I don't question our own records.

Q. Because, as a matter of fact, it was the custom of the Commission each week to approve the minutes of the previous week?

A. Absolutely, yes.

Q. And so you're quite sure that these minutes I have shown you for July 2nd were approved a week later by the Commission as being accurate?

A. I am, yes, sir.

Q. Isn't that right? A. Yes, sir.

Q. That's a fact, isn't it? A. Yes, sir.

Q. That such an instruction was given. Very

(Testimony of John Donovan Flint.)

well. Now, I think you just told us you had never up until June 2nd—just a minute. [469]

A. July 2nd.

Q. Oh, July 2nd, yes. Well, then, I take it, Mr. Flint, that it was the letter of June 27, 1951, Plaintiff's Exhibit 19, which was under consideration at that time by the Commission, namely, at the meeting of July 2nd? A. Yes.

Mr. Clark: That's all.

The Court: Anything else from this witness?

Mr. Ellis: No further questions.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Ellis: Mr. Miles.

THOMAS BOYD MILES

called as a witness by the Defendants; sworn.

The Clerk: Please state your name to the Court.

The Witness: My name is Thomas Boyd Miles.

Direct Examination

By Mr. Ellis:

Q. Where do you reside, Mr. Miles?

A. I live at 4659 Kolohala Street in Honolulu.

Q. What is your business or occupation?

A. I'm a real estate developer.

Q. How long has you lived in the Islands?

A. All my life.

Q. Did you go to school there?

(Testimony of Thomas Boyd Miles.)

A. I finished high school there and I finished college in [470] Oregon.

Q. Do you know the plaintiff, Campos, in this action? A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, for more than twenty years I have known Herb.

Q. Do you know one of the defendants, Carl "Bobo" Olson? A. I do.

Q. How long have you known him?

A. Oh, I have known him pretty intimately since he started boxing in—oh, since about 1943, I guess, or 1944.

Q. Do you know the defendant Sidney—or Sid E. Flaherty? A. I do.

Q. How long have you known him?

A. Since the war years when he was in Honolulu.

Q. Approximately '33 or '4 or——

A. About that time.

Q. Have you ever been connected with the Boxing Commission in the Territory of Hawaii?

A. Yes, I have.

Q. When and for how long and in what capacity?

A. Well, I was secretary-administrator of the Territorial Boxing Commission of Hawaii at which Olson, Campos and Spagnola were present, in connection with a Campos-Olson dispute?

A. I do.

(Testimony of Thomas Boyd Miles.)

Q. Approximately when do you place that meeting?

A. About June of 1951, I think, the meeting we have been discussing. [471]

Q. I will call your attention to Exhibits 17 and 18 of the plaintiff in this action, minutes of the Boxing Commission of Hawaii and ask you whether it is your recollection that you were present at either one or both of those meetings, and, if so, which one or both?

A. I was not present on this date, the 18th.

Q. The 18th?

A. The 18th. I was present on this date, the 19th.

Q. And when you say you were present at the meeting of the 19th, is that the meeting you referred to at which the Campos-Olson matter was under discussion and was held at noon in the Armory in Honolulu?

A. It was a noon meeting.

Q. And that meeting was held in the Armory; was that where they usually met?

A. That's true.

Q. Now, can you give us your best recollection as to who was present at that meeting besides yourself?

A. Well, I know that a forum of the Commission was present because they held their regular meeting that day. The best of my recollection the Chairman, Dr. Paul Withington was present, Commissioner Flint, who just testified here, was pres-

(Testimony of Thomas Boyd Miles.)

ent, either Sherman Dowsett or Leon Sterling, both Commissioners, either one of them was present—I don't recall which one was absent—Mr. Campos was present, Mr. [472] Olson was present, and Andrew Mitsukado, a sports writer of the Honolulu Advertiser was present. I don't particularly recall any others.

Q. You remember a Mr. Stagbar; was he a member of the Commission?

A. Mr. Stagbar was present.

Q. Do you remember a Mr. Sterling?

A. I am not sure that Mr. Sterling was there.

Q. Do you remember a Mr. Spagnola?

A. Mr. Spagnola was there, definitely.

Q. Now, what is your best recollection as to what was said and done at that noon meeting to which you have just referred and at which these people were present?

A. My best recollection was that this meeting was called specifically to iron out the Olson-Campos matter.

Mr. Clark: I will object to that upon the ground it calls for the conclusion of this witness.

The Court: Just state what was said.

Mr. Clark: As to what the purpose was.

The Witness: Mr. Olson complained to the Commission that day about Campos' relationship with him and asked that the Commission take action to allow him to seek employment in the boxing field in a field other than in Honolulu. I am not sure whether Mr. Spagnola interceded for him or

(Testimony of Thomas Boyd Miles.)

whether Carl made this request directly, but one, either Carl or Mr. [473] Spagnola, did take it up with the Commission that day, and it was said that he wanted to leave and come to California to box.

I think the Chairman, who was sitting on my right, then asked Mr. Campos, who was sitting at the other end of the table, whether or not it was all right for Olson to come away insofar as he wasn't obtaining proper employment in the field of boxing in Hawaii, and Mr. Campos said that he could go, that he wouldn't stand in the way of Olson earning a livelihood, and that if he could better himself that way that he certainly would not stand in his way, he would let him go.

Mr. Ellis: That's all.

Cross-Examination

By Mr. Clark:

Q. Mr. Miles, do you remember your deposition being taken in this case? A. I do.

Q. In Honolulu on July 7, 1955?

A. Yes, sir.

Q. In Mr. Ornelles' office in the Stangenwald Building? A. Very well.

Q. At that time you were examined by Mr. Ellis and by myself regarding some of these incidents? A. True.

Q. Let me direct your attention to page 18 of the deposition [474] that Mr. Ellis took of you—and before I get to that, do you remember also I

(Testimony of Thomas Boyd Miles.)

took your deposition, and then we changed around and Mr. Ellis took a deposition from you?

A. I remember that.

Q. Now, I am reading from the Ellis deposition and I will ask you whether or not on that occasion Mr. Ellis, who was calling you as a witness, asked you these questions and whether you gave the following answers. Starting at page 18, your Honor, at line 10.

The Court: All right.

Q. (By Mr. Clark): (Reading.)

“Q. Now, I want to clear up one other thing.”—
This is by Mr. Ellis—

“There has been mentioned on a number of occasions an executive committee meeting of this Commission that occurred some time in the month of June, 1951, after approximately June 18th or 19th, and some time perhaps before June 27th, 1951. Do you recollect any such meeting in which you were present at that time?

A. An executive committee meeting?

Q. Yes.

A. No, I don't recall being in any executive committee meeting.

Q. During the month of June, 1951? [475]

A. I don't recall.

Q. You have no recollection of being present at any such meeting at which Mr. Campos and Mr. Olson and the five commissioners were present?

A. I was there at some meetings, but I don't recall an executive committee meeting where the

(Testimony of Thomas Boyd Miles.)

press was excused, and so forth, and so on. They usually do that. No.

Q. This was supposed to be an executive committee meeting unrecorded, an unrecorded meeting.

A. No.

Q. You don't have any recollection of it?

A. In regular meetings, but I don't recall being in an executive committee meeting.

Q. Then if anyone has stated that you were in such a meeting, then they were incorrect?

A. To the best of my knowledge, they were incorrect.

Mr. Ellis: That's all.

Mr. Clark: No further questions."

Ending at line 13, page 19.

You so testified? A. Yes.

Mr. Clark: We will offer that portion of the deposition in evidence, your Honor. [476]

Mr. Ellis: Now, will you explain your answer and how you happened to recollect what took place?

The Witness: I've never been to any executive meeting of the Territorial Boxing Commission, to the best of my recollection and knowledge; the meeting that we attended was an open meeting called for these—the specific purpose of discussing this matter between Olson and Campos. In my estimation an executive committee meeting is a closed meeting of the Commission, and I so answered that on that basis, that I had not been invited to any executive committee meeting, and I couldn't recall being invited to one then, and I still can't.

(Testimony of Thomas Boyd Miles.)

Q. (By Mr. Clark): You know, of course, this is an unrecorded meeting? Well, Mr. Miles, you have examined the minutes? A. Yes.

Q. Of the meeting of June 19th in preparation for your testimony here, haven't you?

A. Yes, I have examined them.

Q. And you know they say nothing about the various things you have testified to, all they talk about is the cancellation of the Chuck Hunter fight; you know that.

A. No, that isn't true. On the——

The Court: Well——

Mr. Clark: Well, it speaks for itself. That's all.

The Court: It isn't particularly important. His [477] testimony doesn't vary substantially from the plaintiff and other witnesses.

Mr. Ellis: That's all. [477-A]

* * *

Mr. Ellis: Your Honor, I have two documents here which I wish to introduce and read a portion therefrom. The minutes of the meeting of the Territorial Boxing Commission, photostatic copy taken from the official records on deposition in Honolulu for October 8, 1951, at 12:30 p.m., at the Honolulu Armory, at which was shown to be present, Dr. Paul Withington, Arthur Stagbar, Sherman N. Dowsett, Robert H. Lee, and among others Herbert Campos. Absent, J. Donovan Flint (Business), Leon K. Sterling (Business). And that portion

thereof opposite the section "Herbert Campos," the plaintiff in this action.

"Herbert Campos, manager for Carl Olson, presented a letter to the Commission, requesting that Carl Olson be suspended from further participation in boxing on the Mainland. Mr. Campos was informed that inasmuch as he had given permission to Olson to box on the Mainland, the Commission could not suspend Olson. The matter of collecting his manager's share of Olson's purses was a civil one and should be taken up in civil court."

We offer that, your Honor. [478]

* * *

Mr. Ellis: The minutes of the Territorial Boxing Commission, Monday, November 2, 1953, at 4:30 p.m., Honolulu Armory, a photostatic copy taken from the official records on deposition while in Honolulu, and showing as present Dr. Paul Withington, Chairman; Sherman N. Dowsett, J. Donovan Flint, Arthur H. Stagbar, Adam Ornelles, Robert M. Lee, a full house as far as the commission is concerned.

Mr. Clark: Mr. Lee is the secretary, your Honor.

Mr. Ellis: Yes, Mr. Lee is the secretary. And opposite on page 2 the caption "Carl Olson: Mr. Thomas Miles appeared before the Commission, seeking information on the status of middleweight champion Carl Olson with the Commission. The Commission advised Mr. Miles that Olson's memorandum of agreement with manager Herbert Cam-

pos, on file with the Commission, had expired on July 18, 1953. [479]

“The Commission also stated that they would recognize a memorandum of agreement between Carl Olson and his California manager, Sidney Flaherty, if such a contract is filed with the Commission.

“Mr. Miles stated that Olson was interested in appearing in Honolulu for a match and asked if Garth Panter would be approved as an opponent for Olson. The Commission replied that any boxer of recognized standing would be approved as an opponent for Olson if he should box in Honolulu.

“Mr. Miles presented himself as an ‘agent’ for world middleweight champion Carl Olson and his manager, Sidney Flaherty.”

I believe I have read it all, have I?

Mr. Clark: I think so.

Mr. Ellis: That portion.

The Court: All right.

Mr. Ellis: Offer that next in order.

The Clerk: Defendants’ Exhibit H introduced and filed into evidence.

(Minutes of Territorial Boxing Commission dated November 2, 1953, admitted in evidence and marked Defendants’ Exhibit H.)

Mr. Ellis: Now, your Honor, I have certain portions of certain depositions and I have picked out the portions that I want to read into the record. The deposition of Sherman N. Dowsett, may we have that opened? [480]

Mr. Clark: May it please your Honor, I will object to any testimony in the deposition of Dowsett concerning the June 19, 1951, meeting, upon the ground that the witnesses have testified and the record shows that he simply was not there.

Mr. Ellis: The best evidence of whether a man was there is his own testimony; he testifies he was there.

Mr. Clark: It's not the best evidence when the minutes state he wasn't there; Mr. Spagnola, produced and vouched for by Mr. Ellis, stated he wasn't there, and——

The Court: Was this matter gone into?

Mr. Ellis: You see, counsel has fallen into the same pitfall he attempted to place some of these witnesses. He is still trying to confuse himself and perhaps trying to confuse others. He is overlooking the fact that we are talking about an unrecorded meeting held for one purpose by the Commission, not as an official meeting, not reported as an official meeting, but solely for the purpose for the Commission members and those interested they permitted to be present to discuss and wind up and terminate this confusing conflict that had existed for some months between Olson and Campos, and the record is replete with the evidence that this is an unrecorded meeting, and the only confusion that arises in the minds of most people is that it took place at the same time and immediately following a reported meeting. The reported meeting was totally barren of anything other than the fact it recites that there was a meeting [481] held on the 19th,

and I think Lau Ah Chew or somebody asked a fight be postponed or put over for two or three weeks.

The Court: I understand your point. At any rate, what do you want to read in the deposition? I will overrule the objection.

Mr. Clark: Very well, your Honor.

Mr. Ellis: What was that?

Mr. Clark: I was answering his Honor. His Honor overruled my objection and I said "Very well." Mr. Ellis asked me what I said.

DEPOSITION OF SHERMAN N. DOWSETT

Mr. Ellis: Page 4, line 22:

"Q. Now, we will go back to the beginning of the year 1951 as a point to start from in the beginning. Do you recall any complaints filed or brought to the attention of the Commission by Bobo Olson during that year?

"Mr. Clark: Just a minute. I will object to the use of the word 'filed' in the alternative.

"Mr. Ellis: Brought to the attention of the Commission. I will strike the word 'filed'.

"A. There were. There was a complaint brought to the attention of the Commission. As to the date, I can't say exactly what the date was."

Mr. Clark: What page are you reading from?

Mr. Ellis: I went over to 5 from 4. [482]

Mr. Clark: Very well.

Mr. Ellis: (Continuing.)

"A. It was some time after I was on the Box-

(Deposition of Sherman N. Dowsett.)

ing Commission that it was brought to our attention that there was some disagreement between the plaintiff and Carl Olson who was then his boxer."

Page 6, line 14:

"Q. Do you recall what the nature of that disagreement was as announced by boxer Carl Olson to the Commission?

"Mr. Clark: Mr. Ellis, I assume that the same stipulations entered into on the depositions applies to Mr. Dowsett's deposition?

"Mr. Ellis: That's right. That is with reference to all instances, as I understand.

"The Witness: What is that stipulation?

Mr. Ellis: Oh, that has nothing to do with you. That is an agreement between counsel.

"A. I don't remember the exact reasons for that except that they have to do with the fighter's prospective future as pertaining to a fighter's ability.

"Q. (By Mr. Ellis): Was it in connection with lack of fighting?

"Mr. Clark: Just a minute. I object to that upon the ground that it is leading and suggestive.

"A. No, I don't remember exactly what it was, the exact points that were brought up by the fighter at the time as to what was wrong, except it did have to do with his ability to progress in his professional fight career."

The Court: This was referred to earlier, to the earlier meeting.

Mr. Ellis: This is the start of the conflict in February of '51.

(Deposition of Sherman N. Dowsett.)

The Court: Can't you narrow it down? There isn't much dispute as to what took place at the other meeting.

Mr. Clark: No dispute.

Mr. Ellis: No dispute. Page 12, line 3:

"Q. Now, we have accepted here on or about June 27th as the date in 1951, the date that Mr. Olson left the Hawaiian Territory for the Mainland. Do you recall a meeting that was held by the Commission shortly before that time in which Mr. Olson and Mr. Campos were present?

"A. Well, just one question. I will have to ask one question before I can answer that. Now, Bobo Olson left for the mainland once and then was suspended and brought back again.

"Mr. Clark: We are talking about the second time.

"A. The one where he left and never came back? [484]

"Mr. Clark: That's right.

"A. Yes, I do.

"Mr. Clark: Which we tentatively established as being June 27th.

"A. (Continuing): That was an executive session after a regular meeting that was held."

In other words, I want to clarify what they say about this executive session.

Page 13, line 4:

"The Witness: I believe it was an executive session that was held.

"Mr. Clark: An extension of a regular meeting?

(Deposition of Sherman N. Dowsett.)

“The Witness: Well, it is not exactly an extension. You adjourn a regular meeting and you go into an executive session.

“Mr. Clark: Well, I mean, a few minutes later?

“The Witness: Right.

“Mr. Clark: So that there would be minutes of the regular meeting?

“The Witness: Yes.

“Mr. Clark: If not of the executive session.

“The Witness: I am not sure of the executive session, because very seldom were minutes taken of the executive session.”

At page 17, line 5: [485]

“Mr. Clark: Well, I will give you the stipulation, that assuming the minutes show there was a meeting one week following June 18th, and that Mr. Dowsett was present, that then you saw the minutes of the previous meeting.

“The Witness: Correct, because those would have to be approved at the following meeting.

“Mr. Clark: And there was a meeting on June 25th or 26th, whenever it was”——

The Court: I don't like to keep on interrupting you, but I have heard this so many times. Can't we get down to what was said at this meeting of June 19th? All this palaver between the lawyers about the minutes, we have gone over this so many times. I hope you don't think I am impatient, but a judge likes to get his mind on the thing that's before him.

Mr. Ellis: That's right. I want to get there too; I didn't want to miss any of these other matters.

(Deposition of Sherman N. Dowsett.)

The Court: All right.

Mr. Ellis: On page 18:

“Q. (By Mr. Ellis): Taking those two dates, June 18th and June 19th, the minutes, the 18th in which you were present and the 19th in which you were not, and the date that we have adopted as the date Olson left for the Mainland for the last time or permanently, with reference to those two dates [486] when approximately would you say that this executive meeting of the Commission was held?

“A. There is no way that I can——

“Q. Well, approximately.

“A. If my memory serves me correctly, Bobo left within forty-eight hours after the meeting. I may be wrong, but I remember him leaving very shortly after the meeting.

“Q. Well, then, you would say——

“A. I may be wrong, but if he left on the 27th I—I would say the meeting was probably the 25th or 26th. Now, that may not be correct but as best as my memory serves me.”

Page 19, lines 23 to 25:

“Q. So the Commission was there, the entire Commission was there, as you can recollect, and Mr. Campos and Mr. Olson? A. Right.”

In other words, he says the Commission was there, the entire Commission, Campos and Olson were there.

Now, line 11 (page 21):

“Q. Now, what took place at that meeting, to the best of your recollection? What was said by the

(Deposition of Sherman N. Dowsett.)

Commission and what said said by Mr. Campos and what was said by Mr. Olson and what took place? [487]

“A. Well, as is usual when an executive session is requested by any party, at the start of that meeting the chairman of the meeting requests of the party desiring it what the reasons are for the executive session.

“Q. Did he do so at this time?

“A. Yes. I have forgotten who spoke up first, but the crux of the matter was that Bobo Olson either asked for and got or was given permission to leave the Territory. And some mention was made—the manager didn’t wish to stand in the fighter’s way as far as being able to make money as a fighter.

“Mr. Clark: Or to better himself?

“The Witness: Correct.

“Q. (By Mr. Ellis): All right. What else was said, if you recall, by either Mr. Olson or Mr. Campos?

“A. Well, the only recollection I have of anything coming up other than the permission to leave the Territory was a matter which had been brought up before which was some advances, usual advances on the part of a manager to a fighter which were evidently owing, that Bobo evidently owed Campos some money. And in order to go away and possibly better himself or make a better living, Olson would be able to eventually, I guess, pay off his debts [488] or advances that had been made to him by his manager.

(Deposition of Sherman N. Dowsett.)

“Q. Who made any statement about that? Was that Mr. Campos?

“A. Mr. Campos—I don’t know exactly how it was put, but there was money owing from the fighter to the manager, and in giving permission to go he felt that he would be able to recoup the advances that he made to the fighter. I would like to bring up one point here.”

Page 24, line 7 through 16:

“Q. Now, in that connection do you recall at this time what interrogations you conducted at this meeting we are speaking of prior to Olson’s departure for the Mainland in connection with his leaving other than what you told us?

“A. No, I don’t believe that there was anything else said. We got the manager’s verbal approval of this fighter leaving the Territory, and that was the main point at hand, that Bobo wanted to go and he and his manager agreed, I guess, and both parties were perfectly satisfied. Bobo wanted to go and it was all right Herbert, his manager, for him to go.”

Mr. Clark: Now, I move that all go out as the opinion [489] and conclusion of this witness as to what was all right with Herbert, as to the agreement, and he guesses this and that.

The Court: I think that is more or less——

Mr. Clark: Speculative.

The Court: He is merely reiterating what his own opinion is of what was said, really.

Mr. Clark: Yes, your Honor.

(Deposition of Sherman N. Dowsett.)

The Court: He has already covered it. He has already answered it.

Mr. Clark: That's right.

Mr. Ellis: A portion of that: "We got the manager's verbal approval"—this is certainly not guessing. "We got the manager's verbal approval of this fighter leaving the Territory, and that was the main point at hand * * *"

The Court: That is evident from other testimony. The plaintiff himself so testified.

Mr. Ellis: That's right. Now, line 25 on page 24.

Mr. Clark: May I have a ruling on my motion, your Honor?

The Court: Yes. I will grant the motion.

Mr. Clark: Very well. And that goes from—I don't think I specified.

The Court: That goes to the answer given from line 11 to line 16 on page 24.

Mr. Clark: Thank you, your Honor.

Mr. Ellis: Line 25 at page 24: [490]

"Q. (By Mr. Ellis): Were there any limitations placed on Olson going by Mr. Campos, as you recall? A. No. He didn't say * * *"

Mr. Clark: Just a minute. I will object to that question upon the ground that it calls for the conclusion of the witness as to what are limitations or what are not.

The Court: Well, the only part of that answer that I can see is a statement of a conversation is line 6 and line 7.

(Deposition of Sherman N. Dowsett.)

Mr. Ellis: He said he could go and better himself and further his fight career.

The Court: That is a statement of a conversation; the rest of it is a conclusion. That part of the answer that reads "he said he could go and better himself and to further his fight career" may be allowed; the rest of the answer commencing on line 2 and ending at line 16, page 25, is stricken.

Mr. Ellis: Now, lines 17 to 25 and through 2 on page 26:

"Q. Did the Commission approve Olson's departure at that time or take any action in regard to it?

"A. I don't believe they took any action.

"Q. They didn't oppose his going?

"A. No.

"Mr. Clark: Just a minute. That is a conclusion of this witness. It is his individual opinion.

"The Witness: He just came in actually, as far as I could see, they both came to us to inform us that [491] they had reached an agreement whereby Olson was free to go. That was the essential part of the meeting that I remember."

Mr. Clark: Just a minute. I move that go out.

The Court: Yes, it may go out.

Mr. Clark: As a conclusion of this witness.

The Court: It may go out. You got it in; it doesn't enhance anything to hear the witness tell his views about it.

Mr. Ellis: Doesn't add anything further.

The Court: No.

(Deposition of Sherman N. Dowsett.)

Mr. Ellis: And the others are not material. We offer the deposition of Sherman N. Dowsett, then as defendants' exhibit next in order.

Mr. Clark: Well, I will object to the whole deposition.

The Court: I don't want to have to go through the whole deposition now and rule on every objection that was made. You're offering the parts that you read?

Mr. Ellis: The parts we read, yes.

The Court: All right, the parts that you have read.

Mr. Ellis: And were admitted.

The Court: Subject to the rulings that the Court made.

Mr. Clark: May I read a small part of the cross-examination, your Honor?

The Court: Very well.

Mr. Clark: The cross-examination starting on page 35, [492] line 23:

“ Cross Examination

“By Mr. Clark:

“Q. Mr. Dowsett, during 1951 were you on active duty with the air force?

“A. I was. I went on active duty in 1950.

“Q. In 1950? That was on the occasion of the outbreak of the Korean war?

“A. That's correct.

“Q. And is that army or navy?

(Deposition of Sherman N. Dowsett.)

“A. It was neither. It was the air force.

“Q. I’m sorry. I am an army man. I don’t like to tread on your toes. I realize the pride you have in the recently formed air force. All right. At any rate, you were an active duty with the air force during 1951—correct? A. Yes, sir.

“Q. And when were you relieved from active duty?

“A. I was relieved the last day of August, 1953.

“Q. 1953? A. That’s correct.

“Q. Now, during the spring of 1951 and up until, we will say, July of that year were you based here in Honolulu?

“A. I was based here the whole time.

“Q. And where?

“A. At Hickam Field, living at my home. [493]

“Q. And then did you take periodic flights from Honolulu?

“A. That’s correct, that’s right. I made approximately one trip a month.

“Q. I see. Now, am I correctly stating that during that period of time, which will take us to the first of the year 1951, up until July 1st of that same year, you were absent on numerous occasions from meetings of the Boxing Commission?

“A. I don’t know about your word ‘numerous’. It depends on the number of meetings they had. I don’t know how many. I missed some.

“Q. Let’s take a look at the minutes we have here. May I have those, Mr. Ellis?”

(Deposition of Sherman N. Dowsett.)

Now, skipping, may it please your Honor, over to line 21, page 40. Still on cross-examination.

“Q. Would you say, Mr. Dowsett, that it was a meeting following this meeting of June 12th that the executive committee meeting was held that you testified to in your direct examination?

“A. That I can’t say.

“Q. You have no recollection on that?

“A. I don’t remember specifically what meeting it was that we had this executive session hearing with Olson and Campos. Is that what you mean?

“Q. Well, I am asking you whether it was immediately [494] following the meeting of June 12th that you had that executive session.

“A. I don’t remember.

“Q. You don’t remember that? A. No.

“Q. Now, you will note that you were present at the meeting of June 18th, according to the minutes, and that is a fact, isn’t it? A. Yes.”

Now, those minutes are in evidence, your Honor, June 18th.

“Q. And at that meeting, or rather in the minutes of that meeting as recited, that promoter Lau Ah Chew requested approval to cancel the Olson-Hunter fight that was rescheduled from June 19th to July 3rd. It says as follows:”

And then I read from the minutes already in evidence. That ends at line 18, page 41. And then coming over to the next page, line 1, page 42, after having read an excerpt from the minutes of June 18th.

“Q. Do you have any independent recollection

(Deposition of Sherman N. Dowsett.)

of that meeting and the things that were done there as recited in the minutes?

“A. Yes, I remember the business conducted with relation to the Hunter-Olson thing in both of these meetings. It was scheduled on one day and requested to be [495] moved up, and requested to be cancelled.

“Q. And requested to be cancelled? And it was at this meeting of June 18th, 1951, as shown in the minutes, that Lau Ah Chew requested an outright cancelling rather than simply a postponement?

“A. Yes.

“Q. Now, can you tell us whether or not it was immediately following this meeting of June 18, 1951, that the executive session you have told us about in your direct examination was held?

“A. I wouldn't be able to tell you where that executive session was held because I don't remember.

“Q. You have no recollection as to the time?

“A. I don't remember after which meeting it was held.

“Mr. Ellis: He testified it was a few days before Olson's departure.

“The Witness: That's right. To the best of my knowledge.

“Q. (By Mr. Clark): Now, I would like to show you the minutes of the meeting on June 19, 1951, at which according to the minutes you were not present.

(Showing a document to the witness.)

(Deposition of Sherman N. Dowsett.)

“A. Right. [496]

“Q. And in that connection I direct your attention to the statement in the minutes reading:

‘Absent: Sherman N. Dowsett (Duty).’

So the fact is, you weren’t present at that meeting? A. That’s right.

“Q. So that when the Olson-Chuck Hunter was actually cancelled by the Commission, you were not present? A. That’s right.

“Q. Is that correct? A. Yes.

“Q. And you did not take part in any proceedings of the Commission in that respect, is that right? A. Yes.

“Q. That is true, is it not? A. Yes.”

Ending at line 19, page 43. We offer those portions of the Dowsett deposition in evidence, may it please the Court.

The Court: Very well.

Mr. Ellis: I assume the Court also will take judicial notice of geographical locations and that the Court knows that Hickam Field is not too far away from Honolulu and is not so far away that a man, as an officer in the air force——

Mr. Clark: Well, Korea is, though.

Mr. Ellis: ——so that he couldn’t get to this meeting—he wasn’t in Korea. [497]

Mr. Clark: He testified in other parts.

Mr. Ellis: He said he made occasional trips.

Mr. Clark: Once a month.

Mr. Ellis: The rest of the time he had a nice billet.

(Deposition of Sherman N. Dowsett.)

Mr. Clark: Yes.

Mr. Ellis: Now, we have the deposition of Robert M. Lee. May we have that opened?

Mr. Clark: Of what?

Mr. Ellis: Robert M. Lee.

Mr. Clark: Oh, yes.

Mr. Ellis: I think you have heard of him.

Mr. Clark: Secretary of the Boxing Commission.

Mr. Ellis: I had scheduled the reading of a number of sections in this, but finally resolved to limit to to one.

The Court: For which the Court is duly grateful.

Mr. Ellis: Page 93, commencing at line 17, down through line 9 on page 94:

“Q. Now, will you tell us in substance what was said at that meeting by the persons present.”

Referring to the meetings, the famous meetings of June 18th and 19th, particularly the 19th, and this informal gathering.

“A. At the meeting I referred to, they had discussed this matter of Olson leaving. They wanted to clarify the thing, whether Campos was going to bring action against Olson at that particular time. [498] And then Campos said that Olson could go and that he wasn't going to deprive the boy or attempting to deprive him from attempting a livelihood, that the boy could go.

“Q. Was anything said at the meeting regard-

(Deposition of Sherman N. Dowsett.)

ing any financial arrangements between Campos and Olson?

“A. No, I don’t recollect at that time that anything was said of any financial arrangement between Olson and Campos. I have tried to think about that, and I can be confused with another meeting, but I thought that Campos discussed the financial things but the Commission told him that was his own kuleana (Hawaiian term for ‘affair’ or ‘business’.” [499]

* * *

Mr. Ellis: Now, in connection with the deposition of Dr. Paul Withington, in the interest of expediting this matter we are satisfied with the portions of that deposition read by counsel for the plaintiff and submit as part of our case page 45, lines 19 to 23, page 49, line 21 on through page 50, line 1 to 25, page 51, lines 1 and 2, page 52, line 6 to 9, being the same portions read by counsel for plaintiff.

The Court: Very well.

Mr. Ellis: Now, Carl Olson, will you take the stand?

Mr. Clark: There is one small portion, may it please your Honor, of the Lee deposition I would like to read before we leave it and before Mr. Olson takes the stand. It is just following the portion read by Mr. Ellis on page 94.

The Court: Very well. Read it.

Mr. Clark: Commencing on page 94 at line 10:

DEPOSITION OF ROBERT M. LEE

“Q. His own business?

“A. His own business and he had to go settle that.

“Q. Do I understand, Mr. Lee, that you do recollect that Campos mentioned the financial arrangements which were to be had or asked about it and the Commission told him he would have to straighten that out?

“A. No, I don't. I don't. I think that nothing was said at that particular time, but what I was trying [500] to tell you is that I am not too certain in my mind that he did or he did not say it. I think that would be safe.

“Q. You wouldn't swear either way?

“A. I wouldn't swear either way.

“Q. Now, at this meeting I think you have told us the Commission took no action whatever towards a cancelling of the contract?

“A. That's correct.” [501]

* * *

Mr. Clark: Reading on, your Honor, at the top of page 95:

“Q. Was there any request made at that meeting by Olson that his contract be cancelled?

“A. No, there was no request.

“Q. In other words, as I understand you, it was solely on the subject of whether he would be allowed to go to the Mainland without Campos taking action before the Boxing Commission?

“A. That's correct.

(Deposition of Robert M. Lee.)

“Q. Is that right?”

Mr. Ellis: That is his conclusion.

The Court: Yes. I will sustain the objection to that [502] part.

Mr. Clark: Very well. That's all we care about in the Lee deposition.

That ends, your Honor, for the purposes of the record, at line 8, page 95, including the portion we have just struck out.

The Court: Very well.

CARL OLSON

previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Ellis:

Q. Mr. Olson, do you recall attending a meeting on or about June 19, 1951? A. I do.

Q. At the Armory in Honolulu? A. I do.

Q. Before the Boxing Commission?

A. I do.

Q. You do. Do you recall who was present, can you state from your recollection now who was present? Was Mr. Campos there?

A. Mr. Campos, Dr. Withington, Chairman of the Commission, and about three other Commissioners, I don't remember who, Mr. Flint and a couple of the others, and James Spagnola, Tommy Miles and myself.

Q. That meeting was called for—withdraw

(Testimony of Carl Olson.)

that. [503] What was said by you, if anything, at that meeting?

A. Well, I told the Commission that I wasn't getting any fights, that I wanted to go to the Mainland because I had no money and my family didn't have enough to eat. So they called on Herbert Campos and Mr. Campos said that he is not stopping me from making a living, I can go anywhere and fight. So I left.

Mr. Ellis: That's all.

Cross-Examination

By Mr. Clark:

Q. You left the next morning, didn't you, Bobo?

A. I think I did, yes.

Q. Now, prior to that time, before this Commission meeting, along in May, did you try to buy your contract from Campos?

Mr. Ellis: Just a minute. I object to any interrogation beyond the scope of my direct examination, which was limited exclusively to the June meeting, 1951.

Mr. Clark: This bears on the question, your Honor, as to whether there was any intention to release the rights under the contract or not.

The Court: But the witness only testified as to a factual matter, as to something that was said at a meeting.

Mr. Clark: After all, your Honor, this is a court case, there is no jury; I'd only have to recall Mr.

(Testimony of Carl Olson.)

Olson on rebuttal. I think it's proper rebuttal. It goes—— [504]

The Court: Have to make him your own witness.

Mr. Clark: As an adverse witness I have that right.

The Court: Well, of course, it isn't properly—it would be something that was raised that is not entirely immaterial, it has nothing to do with the case——

Mr. Clark: Well, your Honor, it goes——

The Court: Now you want to rebut.

Mr. Clark: It goes to the fundamental question in the case, as your Honor has stated. In fact, your Honor stated at the outset of the hearing three days ago that in your opinion the pivotal issue here was what resulted from the June 19th meeting, was it in effect an abandonment or modification or not.

Now, here's testimony which I propose to put in through Mr. Campos that in May, some thirty days before this, Mr. Olson attempted to buy his contract from Campos for \$6,000 and Campos wouldn't sell it.

The Court: That is something somebody has already testified to.

Mr. Clark: No, it has been stated.

The Court: No, a witness testified to that.

Mr. Clark: The witness Spagnola testified to Campos refusing \$3,000.

The Court: Yes.

(Testimony of Carl Olson.)

Mr. Clark: Now, here's another, different proposition, [505] not Spagnola.

The Court: Go ahead and ask him.

Mr. Clark: Not Spagnola's offer at all.

Q. Now the thing I want to ask you, Mr. Olson, is this: Shortly before this meeting you have told us about did you go to Campos and offer him \$6,000 for your contract? A. I think I did.

Q. Yes. Now, so we can shortcut it, let me read from your deposition. I will ask you whether the answers you gave at that time are correct, and you please follow me.

This is from page 64, your Honor, of Mr. Olson's deposition in this case, commencing at line 20.

Now, you follow me; listen to them.

"Q. Now, along about that time did you go to Campos and try to buy your contract from him?" And this refers to May, 1949, which was a month before this meeting. Do you have that in mind?

A. Yes, sir.

The Court: No, that couldn't be right. You have got the wrong date, haven't you?

Mr. Clark: What did I say?

The Court: May, 1949.

Mr. Clark: I mean May, 1951, precisely.

"Q. Now, along about that time did you go to Campos and try to buy your contract from him? [506]

"A. Yes, but I think he wanted too much money for it.

"Q. Well, did you offer him \$6,000 for it?

(Testimony of Carl Olson.)

“A. Yes.

“Q. And he told you he wouldn’t sell it for that? A. Yes.

“Q. And did you go to him on more than one occasion to attempt to buy your contract from him?

“A. I think I did. I don’t remember.

“Q. Well, isn’t this what happened, Bobo:

“Didn’t you go to see Campos and offer him \$6,000 for the contract? A. I did.

“Q. And he told you that he knew that you didn’t have that much money? A. Yes.

“Q. Is that right? A. Yes.

“Q. Now, you didn’t have the six thousand to buy it? A. No, I was going to borrow it.

“Q. And who were you going to borrow it from? A. I don’t remember.

“Q. Had Mr. Flaherty offered to stake you on it? A. No.

“Q. He had not? [507] A. No.

“Q. Or Miles?

“A. No, it was somebody in the Islands. I can’t remember who.”

That takes us to line 15, page 65.

Now, did you give those answers in your deposition? A. Yes, I did.

Q. And they’re true, aren’t they?

A. Yes.

Mr. Clark: We offer that portion of the deposition in evidence, your Honor.

The Court: All right.

Q. (By Mr. Clark): Now, Mr. Olson, can you

(Testimony of Carl Olson.)

remember now who it was that was to put up the six thousand in the event Campos had accepted it?

A. I was going to see my father; I told him if he would try to borrow the money for me; he had some money.

Q. Your father had some money?

A. Yes.

Q. And you were going to go and see him about it?

A. That's right.

Q. Very well. But Campos refused to sell at that price?

A. He did.

Mr. Clark: That's all.

The Court: Is that all? [508]

Mr. Ellis: That is all.

The Court: That's all.

(Witness excused.)

Mr. Ellis: That is all. That is all for the defense.

Mr. Clark: May it please your Honor, we will make one offer, or the offer of one document. We will now offer in evidence the original contract of January 29, 1946, between Maurice Lipton and Sid Flaherty, the authenticity of which has been conceded on deposition.

The purpose of the offer is to show the connection between Mr. Lipton, Mr. Leavitt, Mr. Flaherty on the theory that I explained to your Honor this morning with regard to Bobo Olson starting under the Lipton contract. And this contract also, may it please your Honor, evidences a transaction between a manager, namely, Lipton, who has a con-

tract on the fighter, and who was in the Islands, and the trainer in California—trainer Flaherty in California, which is that the trainer gets one-third of the manager's share, the same deal exactly that Campos had with Sharkey Wright as his trainer down in Hawaii, which is already in evidence, one-third of the manager's share. On those two theories of relevancy we will offer that document in evidence. It has been marked for identification.

Mr. Ellis: We object—renew our objection to that document as originally offered; it is incompetent, irrelevant and immaterial, remote, in no way connected with the issues in [509] this case, and has no bearing whatever on any alleged breach of an alleged document bearing dates of '48 or '49. This is 1946, the parties are different in this case and the relationship between a Moe Lipton and a Sidney Fraherly have no relevancy whatever to the relations between the parties to this action that are Campos, Olson and Flaherty.

The Court: You are offering this for the purpose of showing some relationship between——

Mr. Clark: Lipton and——

The Court: That defendant Flaherty had with Olson back in 1946?

Mr. Clark: Precisely. It is the power of attorney, too, your Honor, that is spoken of in the settlement of 1950, and it's relevant evidence to show the group who were handling Olson at that time, namely, Lipton, Leavitt and Flaherty.

Mr. Ellis: It doesn't show anything of the kind.

Mr. Clark: It's our position.

Mr. Ellis: It shows there was a trainer by the name of Flaherty.

Mr. Clark: Sid Flaherty.

The Court: This is a different Flaherty?

Mr. Clark: No, the same Flaherty, your Honor.

The Court: Well, I don't see the relevancy of it, counsel.

Mr. Clark: I want to make the offer, your Honor, and take the ruling. [510]

The Court: Well, having, as always, a deep-seated fear of the overseers, I will admit it in evidence. If it is necessary to comment on its relevancy when the case is decided, I will make an appropriate comment.

Mr. Clark: Very well. I know your Honor has no fear of any ulterior purpose on my part.

The Court: I don't know as much about this case as you gentlemen do.

Mr. Clark: Of course not.

The Court: What exhibit number will that be?

The Clerk: Plaintiff's Exhibit 36 admitted into evidence.

The Court: All right; admitted.

(Original contract of January 29, 1946, between Maurice Lipton and Sidney E. Flaherty, admitted in evidence and marked Plaintiff's Exhibit 36.)

Mr. Clark: That's all of our rebuttal, and the plaintiff rests.

* * *

[Endorsed]: Filed May 29, 1956. [511]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein and designated by counsel for appellant and appellees:

Excerpt from Docket Entries.

Complaint.

Answer.

Supplemental Answer.

Notice by Defendant and Motion for Bond for Costs by Non-Resident Plaintiff, With Affidavit and Memo.

Notice by Defendant of Motion for Pretrial, and Minute Order Thereon.

Cost Bond by Non-Resident.

Order Denying Motion for Additional Security.

Petition of Maurice Lipton in Intervention.

Notice by Maurice Lipton of Motion for Leave to Intervene.

Answer of Defendant to Petition for Intervention.

Affidavit of Webster V. Clark in Opposition to Motion for Intervention.

Answer of Plaintiff to Petition for Intervention.

Memorandum and Order Denying Intervention.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Findings of Fact and Conclusions of Law (lodged by defendants).

Plaintiff's Proposed Modifications to Findings and Conclusions.

Notice of Appeal.

Cost Bond on Appeal.

Supersedeas Bond.

Order Staying Proceedings to Enforce Judgment.

Appellant's Designation of Record on Appeal.

Appellees' Designation of Record on Appeal.

Stipulation Omitting Certain Papers From Record on Appeal.

Defendants' Trial Memorandum.

Defendants' Supplemental Trial Memorandum.

Reporter's Transcript of Proceedings, Dec. 12, 13 and 14, 1955.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 7-a, 8, 9, 10, 10-a, 10-b, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26-a, 26-b, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37.

Defendants' Exhibits A, B-1, B-2, B-3, B-4, C-1, C-2, D, E, F, G and H.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of July, 1956.

[Seal]

C. W. CALBREATH,

Clerk;

By /s/ MARGARET P. BLAIR,

Deputy Clerk.

[Endorsed]: No. 15,183. United States Court of Appeals for the Ninth Circuit. Herbert Campos, Appellant, vs. Carl E. Olson, Also Known as Carl "Bobo" Olson; Sid E. Flaherty and Sid Flaherty Promotional Enterprises, a Corporation, Appellees. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed July 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,183

HERBERT CAMPOS,

Plaintiff and Appellant,

vs.

CARL E. OLSON, Also Known as CARL "BOBO"
OLSON; SID E. FLAHERTY; SID FLA-
HERTY PROMOTIONAL ENTERPRISES,
a Corporation, et al.,

Defendants and Appellees.

STATEMENT BY APPELLANT, HERBERT
CAMPOS, OF POINTS ON WHICH HE
INTENDS TO RELY ON APPEAL

Appellant, Herbert Campos, states the following points upon which he intends to rely on the appeal in the above-entitled cause:

1. The District Court erred in entering judgment for defendants and against plaintiff,
2. The Court below erred in holding that there was no breach of the contract of July 14, 1948, or the contract of July 20, 1949, by the defendant Carl E. Olson.
3. The Court below erred in holding that at the meeting of the Territorial Boxing Commission of Hawaii on June 19, 1951, or at any other time the plaintiff Campos waived his contractual right to

the exclusive services of the defendant Olson under said contracts.

4. The Court below erred in holding that the conduct of the plaintiff Campos at said meeting on June 19, 1951, justified the defendant Olson in assuming that Campos did not expect to share in the proceeds of mainland matches except to be repaid the advances which plaintiff had theretofore made to Olson.

5. The Court below erred in holding that the plaintiff Campos waived his contractual rights under the contract of July 14, 1948, or that of July 20, 1949, to his manager's share of the proceeds of boxing performances engaged in by Olson under the management of the defendant Sid E. Flaherty or the defendant Sid Flaherty Promotional Enterprises commencing on July 9, 1951.

6. The Court below erred in holding that said contracts were mutually abandoned by the plaintiff Campos and the defendant Olson in 1951, or at any other time.

7. The Court below erred in holding that the letter of June 13, 1951, addressed and delivered by the defendant Olson to the Territorial Boxing Commission of Hawaii in which defendant stated that he would not be available for further matches in the Territory until further notice by himself was not an anticipatory breach of defendant's said contracts with the plaintiff Campos.

8. The Court below erred in failing to hold that the contents of said letter of June 13, 1951 to the effect that the defendant Olson intended to leave the management of the plaintiff Campos, were communicated to Campos by Olson prior to said meeting of June 19, 1951 and constituted a repudiation and anticipatory breach by Olson of his said contracts with Campos.

9. The Court below erred in failing to hold that on and prior to June 13, 1951 there was a repudiation and an anticipatory breach of said contracts on the part of the defendant Olson in unequivocally informing the plaintiff Campos that he, Olson, was leaving plaintiff's management and that thereupon plaintiff became entitled to treat the contracts as terminated and to recover damages for the prospective value thereof as of the date of said breach and that plaintiff was excused from all further performance on his part.

10. The Court below erred in holding that plaintiff is not entitled in damages to the prospective value of said contracts as of June, 1951.

11. The Court below erred in holding that the defendant Sid E. Flaherty did not cause or induce to be caused the breach of said contracts between Olson and Campos.

12. The Court below erred in failing to hold that said breach of said contracts was wrongfully induced by the defendant Sid E. Flaherty with knowl-

edge of said contracts on the part of the said Flaherty and without any justification whatsoever.

13. The Court below erred in holding that plaintiff is not entitled to damages from the defendant Sid E. Flaherty and from defendant Sid Flaherty Promotional Enterprises for wrongfully and unjustifiably inducing the breach of said contracts between plaintiff and the defendant Olson with knowledge thereof.

Dated: July 5, 1956.

WEBSTER V. CLARK
LAWRENCE W. JORDAN, JR.
ROGERS and CLARK
ERNEST O. MEYER

By /s/ WEBSTER V. CLARK,
Attorneys for Plaintiff and
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 5, 1956.

No. 15,183

In the
United States Court of Appeals
For the Ninth Circuit

HERBERT CAMPOS,
Plaintiff and Appellant,

v.

CARL E. OLSON, also known as CARL "BOBO"
OLSON; SID E. FLAHERTY; SID FLAHERTY
PROMOTIONAL ENTERPRISES, a corpora-
tion, et al.,
Defendants and Appellees.

Opening Brief of Appellant, Herbert Campos

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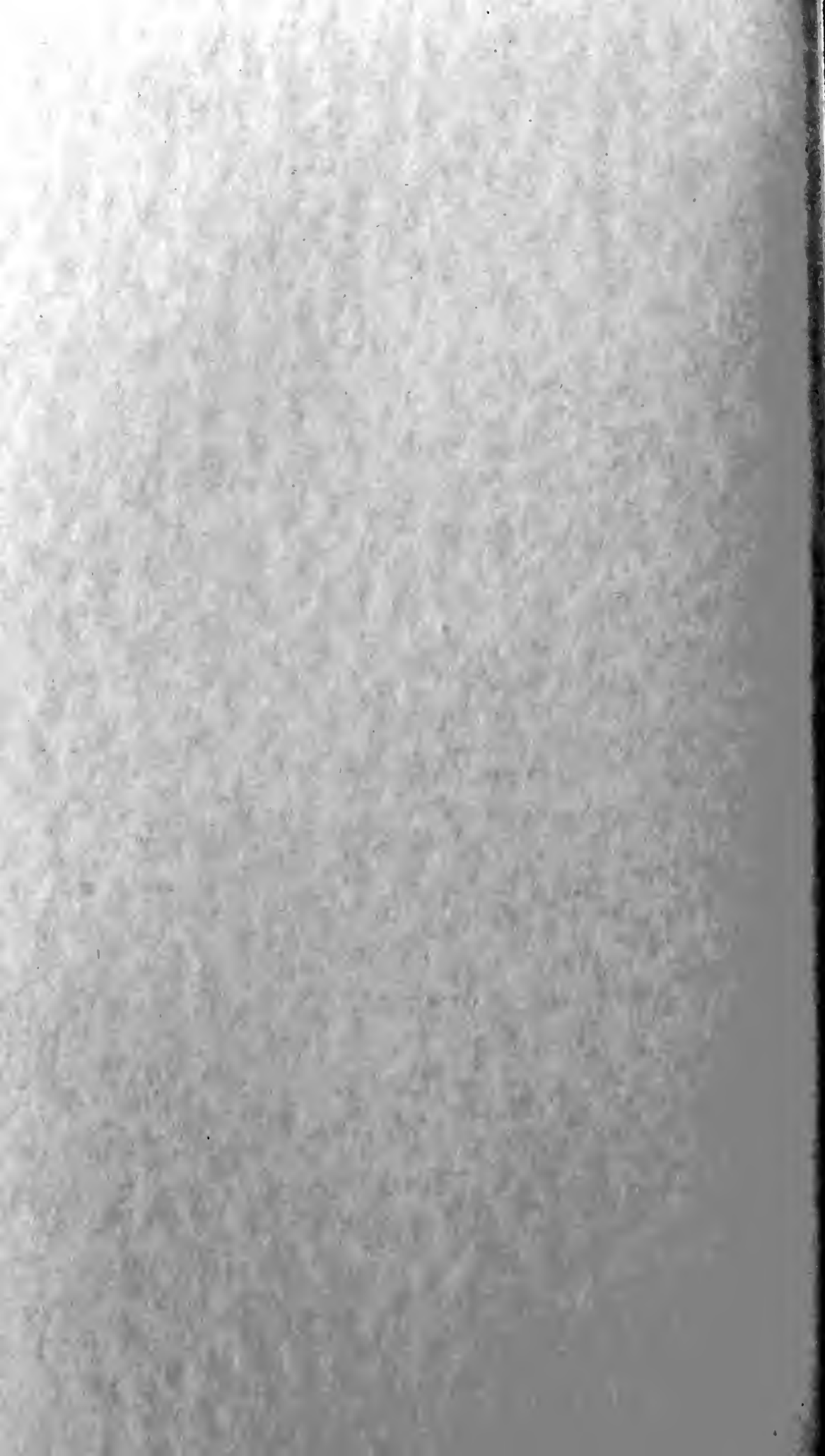


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DRAMATIS PERSONAE*

Dowsett, Sherman N.	}	<i>The Territorial Boxing Commission of Hawaii during the middle of 1951.</i>
Flint, J. Donovan		
Lee, Robert M. (<i>Secretary</i>)		
Stagbar, Arthur H.		
Sterling, Leon K., Jr.		
Withington, Dr. Paul (<i>Chairman</i>)	}	
Campos, Herbert.....		<i>Plaintiff.</i>
Flaherty, Sid E.....		<i>Defendant, Boxing Manager.</i>
Leavitt, Leo.....		<i>Hawaiian Boxing Promoter.</i>
Lipton, Maurice (Moe).....		<i>Olson's Manager 1946-47.</i>
Miles, Thomas B. (Tommie).....		<i>Former Secretary of Territorial Boxing Commission, Advisor to Olson.</i>
Miller, Charles W.....		<i>Olson's Manager 1947-48.</i>
Olson, Carl E. (Bobo).....		<i>Defendant, Professional Boxer, Former World's Middleweight Champion.</i>
Spagnola, James A.....		<i>Bowling Alley Manager, Licensed Boxing Manager, Olson's "Agent" at the June 19, 1951 Commission meeting.</i>
Wright, Haywood (Sharkey).....		<i>Olson's Trainer.</i>

*For convenience referred to in the brief by surnames only.

No. 15183

In the

United States Court of Appeals

For the Ninth Circuit

HERBERT CAMPOS,

Plaintiff and Appellant,

v.

CARL E. OLSON, also known as CARL "BOBO"
OLSON; SID E. FLAHERTY; SID FLAHERTY
PROMOTIONAL ENTERPRISES, a corpora-
tion, et al.,

Defendants and Appellees.

Opening Brief of Appellant, Herbert Campos

JURISDICTION

This is an appeal from a final judgment of the District Court for the Northern District of California, Southern Division, entered May 7, 1956 (R. 55-56).¹ Notice of appeal was filed May 28, 1956 (R. 57).

The jurisdiction of the District Court was invoked under 28 U.S.C.A., Sec. 1332. The plaintiff Herbert Campos is, and at all times herein material was, a resident and a citizen of the Territory of Hawaii (R. 29). The defendants, Carl E.

1. References to page numbers in Transcript of Record are shown by the page number following R. in parentheses.

Olson and Sid E. Flaherty, are and at all times herein material were citizens and residents of the State of California (R. 49).

The amount of the controversy exceeds \$3,000.00, exclusive of interest and costs (R. 49).

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1291 and 1294(1).

STATEMENT OF THE CASE

In this action plaintiff seeks damages against the defendant Olson for the breach of two written contracts and against defendants Flaherty and Sid Flaherty Promotional Enterprises for the tort inducing the breach of contract.

THE FIRST PHASE OF OLSON'S CONTRACTUAL RELATIONSHIPS

1945—April, 1948

In September, 1945 Olson and Lipton signed a fourteen year contract by which Lipton was to act as Olson's manager for 50% of the net purses from boxing matches Olson might engage in (Exhibit 1, R. 59). Olson was 17 years old at this time (R. 345). This contract was later approved by the Superior Court in San Francisco. In January, 1946 Lipton delegated his managerial rights under this contract to Flaherty retaining two-thirds of the 50% for himself (Exhibit 36, R. 408-410).

After seven preliminary bouts under the management of Flaherty, Olson was barred from fighting further in California until he should become eighteen. Olson thereupon returned to Hawaii in February, 1946 (R. 345, 346).

After Olson's eighteenth birthday and being still in Hawaii, he was turned over by Lipton to a promoter named Leavitt (R. 346).

Still in Hawaii and being dissatisfied with the share of the purses he was receiving from Leavitt, Olson signed a con-

tract on February 3, 1947 with Miller as his manager (R. 60).

Olson left Miller after a boxing match in Manila on April 7, 1948 and returned to Hawaii (R. 146).

THE SECOND PHASE

May, 1948—July 20, 1949

In the latter part of May, 1948 Olson requested Campos to manage him (R. 87, 88). Campos consented and made arrangements for Wright to continue as Olson's trainer. Campos agreed to pay Wright one-third of his manager's share (R. 89, 90).

On July 11, 1948, Olson disaffirmed his contract with Miller pursuant to Hawaiian law upon reaching the age of twenty years.²

Campos and Olson then on July 14, 1948 entered into a "commission form" of managerial agreement for a term of five years (Exhibit 2, R. 61). This agreement provided for a manager's share of one-third of net proceeds and met all requirements of the Territorial Boxing Commission and was approved by it on July 19, 1948 (R. 17). It is one of the contracts upon which this suit is based.

On the same date this five year contract was signed, Campos and Olson also entered into a second contract which they termed a "world wide" contract (Exhibit 4, R. 62). Under both of these agreements Olson agreed to perform exclusively under the management of Campos (R. 18).

In November, 1949, after approximately a year and a half under Campos' management, Olson was ranked for the first time as a contender for the middleweight championship of the world, viz, eighth (R. 105).

2. Olson was born July 11, 1928 (R. 82).

THIRD PHASE

July 20, 1949—October 26, 1950

On July 20, 1949 Campos and Olson signed a further "world wide" contract for the term of ten years (Exhibit 8, R. 99). This agreement is the other contract for the breach of which damages are sought in the present case. It was recorded in the City and County of Honolulu and filed with the Territorial Boxing Commission (R. 68-69). After two matches in Honolulu in July and August following this further contract, Olson was scheduled to box Johnny Duke on October 4, 1949 in Hawaii (R. 100).

A few days before September 26, 1949, without Campos' knowledge (R. 100), Olson presented himself to Flaherty in San Francisco. Flaherty, although knowing that Olson was under contract with Campos (R. 320), immediately signed Olson to a contract whereby Flaherty was to act as Olson's exclusive manager for a period of seven years from September 26, 1949 (Exhibit 9, R. 69-70). This contract was filed with the California State Athletic Commission and is the agreement under which Flaherty and Olson were still operating at the time of the trial in December, 1955 (R. 321) although no fights were had under it until Olson's final breach with Campos in June, 1951 which gives rise to the present case (R. 237).

Upon learning of Olson's infidelity in September, 1949 Campos notified the Territorial Boxing Commission and on the date set for the Duke fight, Olson was suspended by the commission for failing to appear (R. 101). Campos arranged for Spagnola to come to San Francisco to persuade Olson to leave Flaherty and carry out the Campos contracts. Spagnola was successful and pursuant to Campos' instructions Olson and he went to New York to arrange for bouts for Olson there (R. 237). Olson's default in the Duke fight and resulting nationwide suspension necessitated their

return to Hawaii without being able to take advantage of opportunities in New York (R. 101-102). Meanwhile Campos was attempting to have the suspension set aside. The Territorial Boxing Commission finally lifted the suspension when Olson met Duke in Honolulu on November 22, 1949 (R. 103, 237-238).

Thirteen months after obtaining the September, 1949 contract, Flaherty, on October 23, 1950, for himself and as attorney in fact for Lipton, released all managerial rights to Olson under the September 18, 1945 Lipton contract and his own September 26, 1949 contract with Olson (Exhibits 10A, 10B; R. 71).

Meanwhile under Campos' management Olson had steadily improved in professional ability. In March, 1950 he met the British Empire middleweight champion Dave Sands, who was also the fourth ranking middleweight in the world (R. 106). And on October 26, 1950 in Philadelphia Olson met champion Sugar Ray Robinson for the first time, losing in the twelfth round (R. 106).

FOURTH PHASE

January, 1951—July 9, 1951

Following the Sugar Ray Robinson fight on October 26, 1950 Olson rested until the first of the year (R. 109, 155). On January 19, 1951 he and Campos entered into an agreement with the promoter Leavitt for six main event matches to be held in Honolulu not more than forty days apart, Olson to box no other opponents during the period of this agreement (R. 71, 109; Exhibit 11). Leavitt failed to produce with the result that Campos and Olson were prevented from obtaining any other matches until the expiration of the first forty day period (R. 110). Clearance was not obtained from the commission until about March 12th (R. 200, Exhibit 34). It will be remembered that this was the

same Leavitt who had been involved with Lipton and Flaherty in the management of Olson back in 1946 and early 1947 (R. 315, 346). The result was that Campos' hands were tied in getting further bouts for Olson until early March.

Meanwhile in February, 1951, faced with this inactivity, Olson commenced talking to Miles about again going back to Flaherty (R. 239). Miles was a former secretary of the Territorial Boxing Commission and a close friend of Flaherty (R. 314-318) and at this time he began advancing money to Olson (R. 239-240).

After waiting out the expiration of the Leavitt agreement, Campos obtained two bouts for Olson in Honolulu, one on March 20th and the other with Lloyd Marshall on May 7th (R. 116, Exhibit 5) and he then arranged for Olson to meet Chuck Hunter in Honolulu on June 19th, this match being approved by the Territorial Boxing Commission on May 28th (R. 75).

Shortly after the Marshall fight on May 7th Olson contacted Flaherty directly about fighting on the mainland (R. 242) and Flaherty replied that “* * * he had a contract on me (Olson), a California contract, that I had signed, *and that was a good contract*” (R. 244, insertion and emphasis ours). This was the contract of September 26, 1949 which Flaherty had obtained with knowledge that Olson was already signed with Campos (R. 320).

Some time in May, 1951 Olson offered Campos \$6,000.00 for his contracts but Campos refused to sell at that price (R. 407-408). Also early in May, 1951 Campos refused an offer of \$3,000.00 from Spagnola (R. 353).

Olson's determination to finally quit Campos at this time appears clearly from other evidence in the record. He told Campos he was going to leave for the mainland after the Hunter fight (R. 249).³ He also told Miles he was “leaving

3. Scheduled for June 19, 1951 (R. 116).

Mr. Campos to go to Mr. Flaherty" (R. 251). He had written Flaherty early in May and received the reply about Flaherty having "a good contract" on him (R. 244). And so that there would be no doubt whatever concerning his repudiation of all further obligation to Campos, Olson delivered a letter to that effect dated June 13, 1951 to the Territorial Boxing Commission which was received by the commission on June 14, 1951 (R. 244-248, Exhibit 35).

The Hunter match had meanwhile been postponed to July 3d (R. 75) and after upbraiding the promoter, Lau Ah Chew, for the postponement, Olson or his scrivener says:

"My Territorial manager *knew that I was scheduled to leave for the mainland to fulfill an engagement with my legal mainland manager, Sid Flaherty, immediately after the bout with Hunter on June 19th.* My Territorial manager was aware that rescheduling the Hunter bout would work an undue hardship on me *to meet commitments on the mainland.*

"In view of the foregoing I maintain that my Territorial manager did not act in good faith in my behalf and I ask that the Commission investigate his actions.

"It is my full intention to carry out the full obligation of the Hunter contract as may be determined through the judicious and unprejudiced action of the Territorial Boxing Commission. However, I hereby state of my own free will *that I will not be available for further matches in the Territory until further notice by myself.*

Sincerely yours,

CARL BOBO OLSON."

(R. 247-248, emphasis ours.)

At the trial Olson admitted that someone else prepared this letter for him but doesn't remember who it was. He *doesn't remember* whether or not it was Miles. In any event he read it over and signed it and personally delivered it to the commission office (R. 244-245).

The letter of June 13th is clearly a binding admission by Olson that he had flatly repudiated his agreements with Campos (IV Wigmore on Evidence, 3d Ed. 19). In it Olson (1) admits that he is leaving for the mainland to fight under Flaherty; (2) admits that Campos knew of his repudiation, and (3) unequivocally announces to the Territorial Boxing Commission that he will no longer respect his agreements with Campos, at least so far as boxing in Hawaii is concerned—"I will not be available for further matches in the Territory until further notice by myself."

Thus Olson's position as communicated to Campos (see R. 249) was in direct violation of the agreements. In the July 14, 1948 five year contract, approved by the territorial commission (Exhibit 2, R. 61, 17-21), Olson had agreed "to render services solely and exclusively" for Campos whenever required by Campos "in the Territory of Hawaii and elsewhere the Manager may from time to time direct" (Id., Sec. 1); and he had also agreed

"* * * that he will not during the continuance of this contract take part in any boxing contests or other exhibitions, perform or otherwise exercise his talent in any manner or place *except as directed by the Manager* (Campos) * * *" (Id., Sec. 5, emphasis and insertion ours.)

And in the ten year contract of July 20, 1949 Olson had also expressly agreed with Campos as follows:

"The Party of the Second Part (Olson) hereby binds himself and promises and agrees that he shall, and will not during the term of this Agreement, take part in any boxing contest, athletic contest, or act, perform, or otherwise exploit or exercise his talents in any manner, shape or form whatsoever, or in any place, where-soever, *except as directed by said Party of the First Part* (Campos)." (Exhibit 8, Sec. 7, R. 24, insertions and emphasis ours.)

We come now to the meeting of the Territorial Boxing Commission held on June 19, 1951.

On Tuesday, June 19th the commission met to discuss the cancellation of the Hunter-Olson match (R. 117).⁴ It approved the "request of promoter Lau Ah Chew to cancel the July 3d show (Carl Olson versus Chuck Hunter)" (Exhibit 18). Immediately after the formal meeting there was an executive session at which Campos, Olson, Miles, Spagnola and Wright were present in addition to the personnel of the commission (R. 118).⁵ Olson told the commission that "he wanted to come up to the mainland to fight under Sid Flaherty" because of lack of fights in Honolulu (R. 119) and according to certain witnesses Campos thereupon simply said he could go (see R. 352, 369, 379, 392, 400, 404).

We submit that the reply attributed to Campos by these witnesses cannot fairly be viewed in isolation. There is other uncontradicted objective evidence which must be considered in arriving at what was really said, namely, the prior refusals by Campos of cash offers for the contracts and the documentary evidence concerning his subsequent efforts to protect his rights (Exhibits 19, 20, 21, 22, 23, 33). Thus Campos' testimony is as follows:

"Olson stated that he wanted to come up to the mainland to fight under Sid Flaherty, and that I couldn't get any fights and he wanted to come up and fight under Sid Flaherty. And I stated—I told the commission I

4. The discussion of this matter was initially set for June 18, 1951, but was put over until the 19th to enable all interested parties to be brought in (R. 367-368).

5. On deposition prior to the trial Miles flatly denied having been present at this executive session. This was in response to questions *by defendants' counsel* in an obvious effort to eliminate Miles and therefore Flaherty from any connection with Olson's decision to leave Campos (R. 380-381). At the trial, however, Miles reversed his position and gave a detailed account of the meeting (R. 377-379).

had contacted Sid Flaherty in May and that Sid Flaherty answered that he couldn't get any fights with anyone to manage the boy, training the boy, and I also stated that I would not stand in the way Olson making a living in the fight game and that [t]he could go to the mainland *provided that I had my contract rights, and also I would get Olson a trainer on the mainland.*" (R. 119, emphasis and correction ours.)

Campos is squarely corroborated by Commissioner Stagbar:

"Q. All right. Was anything said at this last meeting about 'Bobo' going to the mainland?

A. There was.

Q. Please tell us what was said about that.

A. As I recall—I don't know who first brought it up—Olson or Campos—but I do recall this specifically, that Campos said he had no objection to 'Bobo' going to the mainland, that everybody is entitled to make a living, and he would permit him to go to the mainland *but that he still would retain his managerial rights.*

Q. You remember him saying that?

A. I do.

Q. Do you remember anything being said about Campos furnishing a trainer on the mainland?

A. That appears vague in my mind. There was a trainer mentioned some way or other but I can't pin it right down as to saying Campos had proposed it or whether someone had asked him and he said he would want it. *But there was a trainer mentioned during the course of the meeting.*" (R. 214-215, emphasis ours; see also R. 222-223).

Also Commissioner Sterling testified that Campos said he would get Olson "a trainer up there" (R. 277).

The foregoing testimony of Campos, Stagbar and Sterling is controverted only by the inference which may arise from

other witnesses failing to remember or to testify to the condition stated by Campos, and in the case of the witness Spagnola by the statement that "nothing else was said" except that Olson could go (R. 352).

Furthermore it is uncontradicted that the Territorial Boxing Commission took no action whatever with regard to any modification or cancellation of the contracts themselves (R. 277, 304, 402).

Olson promptly left Honolulu for San Francisco the morning following the June 19th meeting (R. 404). Meanwhile Miles had reported to Flaherty as the result of which Flaherty arranged with Miles to pay Olson's transportation (R. 319, 314).⁶ Upon his arrival in San Francisco Olson "went right up to see Mr. Flaherty" (R. 252).

On July 9, 1951 Olson boxed Hunter in San Francisco. This was under Flaherty's auspices where he has subsequently remained.

CAMPOS' EFFORTS TO PROTECT HIS RIGHTS

A "couple of days" after June 19, 1951 Campos learned from the newspaper that Olson had left and "was on the mainland already" (R. 120). He immediately wrote the Territorial Boxing Commission reaffirming his position at the June 19th meeting and asking its assistance in enforcing his contracts with Olson.

6. Miles received his reward later. On June 15, 1954 Olson made his first professional appearance in Hawaii after leaving Campos in a bout with a fighter named Jesse Turner (R. 253). This match was promoted by Boxing Enterprises, Ltd. (R. 333, Exhibit 37) and Flaherty and Olson waived their share of the purse in favor of the promoter (R. 344). Miles participated in the promotion of this fight and in the profits realized therefrom (R. 332, 344).

"6/27/51

Territorial Boxing Commission

Honolulu, T. H.

Gentlemen:

"It is my understanding that Carl 'Bobo' Olson has left the Territory to fight on the Mainland.

"As manager of Boxer Olson, I respectfully ask your assistance, as he left without my knowledge, and consent. *It is not my desire to prevent Olson from fighting on the Mainland but am most anxious to get my share of his purse.*

"Would you be kind enough to notify the National Boxing Ass'n of these facts.

"You and the National Boxing Ass'n are fully aware of the contracts which I have with Olson, one filed with your commission and another which is recorded with the Bureau of Convegances at Honolulu.

"I would appreciate any help you can give me in this matter.

Very truly Yours

Herbert Campos"

(Exhibit 19, R. 78, emphasis ours.)

This letter conforms with the offer Campos made at the meeting and further corroborates his testimony. Within the terms of Campos' offer, his reference to "my share of his purse" clearly means the manager's share remaining after the cost of arranging for a mainland representative.

On July 6, 1951, Campos wired the California State Athletic Commission at San Francisco informing them that he was recognized as Olson's "legal manager" by the National Boxing Association and the Territorial Boxing Commission and asking that the California commission withhold his share of Olson's purse and also stating that action would be taken for Olson's suspension (Exhibit 21, R. 81).

On July 9th, pursuant to instructions of the territorial commission, Secretary Lee replied to the letter of June 27th:

“Dear Mr. Campos:

“In reply to your letter of June 27th the Territorial Boxing Commission wishes to state that it has no jurisdiction in the matter of collecting your manager’s share of Carl Olson’s purse while he is away on the Mainland. The Commission feels that the best procedure to follow would be to write to the California State Athletic Commission, informing them of your rights as Olson’s manager and send them copies of your contracts with Olson, advising them that these contracts have been recognized by the National Boxing Association.

“You can request them to withhold one-third of Olson’s purse for you, or you may have an injunction filed with the California Commission.

Yours very truly,

Robert M. Lee,

Acting Boxing Commissioner.”

(Exhibit 20; R. 80; see also Exhibit 33.)

On October 8, 1951 Campos presented a further letter to the Territorial Boxing Commission requesting Olson’s suspension and stating

“I believe I am recognized as his legal manager by the Territorial Boxing Commission and the N.B.A.”
(Exhibit 22, R. 82)

The Territorial commission’s reply to this letter, which is set forth in its minutes of October 8, 1951 (Exhibit 23, R. 83) was that the commission could not suspend Olson inasmuch as Campos had given his permission “to Olson to box on the Mainland” but that “The matter of collecting his manager’s share of Olson’s purses was a civil one and should be taken up in civil court” (R. 83).

On September 11, 1953 Campos filed suit for damages for breach of contract in the Superior Court in San Francisco (Exhibit 25, R. 83-85). The present action was filed on June 10, 1955 (R. 29).

SPECIFICATION OF ERRORS RELIED UPON

Appellant's statement of points on which he intends to rely on this appeal is set forth at pages 414-417 of the record. In summary the thirteen points are:

1. The trial court erred in holding there was no breach of contract by Olson.
2. The court erred in holding that Olson did not anticipatorily repudiate the contracts.
3. The court erred in holding Campos waived or abandoned his contractual rights under the contracts.
4. The court erred in holding Flaherty or Sid Flaherty Promotional Enterprises, Inc. did not cause or induce the breach of the contracts by Olson.

ARGUMENT

Summary of Argument.

We intend to show:

1. The conduct of Olson prior to June 19, 1951 was so repugnant to his contracts with Campos as to amount to a breach of contract, actually and anticipatorily.
2. There was no mutual rescission of the contracts by Campos and Olson on June 19, 1951.
3. Olson's breach of the contracts was wrongfully caused and induced by the other defendants.

I.

THE CONDUCT OF OLSON PRIOR TO JUNE 19, 1951 WAS SO REPUGNANT TO HIS CONTRACTS WITH CAMPOS AS TO AMOUNT TO A BREACH OF CONTRACT, ACTUALLY AND ANTICIPATORILY.

An anticipatory breach or repudiation of contract takes place when the promisor either makes a positive statement to the promisee that he will not perform his contractual duties or does any voluntary affirmative act which renders substantial performance impossible or apparently impossible (Restatement of Contracts Sec. 318). The doctrine of anticipatory repudiation has been adopted both in the federal courts and in the courts of almost all the states where the question has been raised (5 Williston on Contracts, (rev. ed., 3711)). The doctrine is firmly established in California (*Caminetti v. Pacific Mutual Life Insurance Company* (1943), 23 C.2d 94, 104). All that is necessary is a positive statement by one party to the contract that he does not intend to perform the terms of an existing contract. In *Gold Mining and Water Co. v. Swinerton* (1943), 23 C.2d 19 at page 29 the Supreme Court of California said:

“A contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive statement to the promisee indicating that *he will not* or cannot substantially perform his contractual duties. (*Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal. 2d 565 [51 P.2d 84]; Restatement, Contracts, Secs. 316, 317, 318).” (*id.*, p, 29, emphasis ours.)

In the cited case which involved an action for damages for breach of a mining lease in failing to develop the property and make certain improvements the lessees had stated in a conversation with a representative of the lessor that unless the lessor would consent to an assignment of the lease they,

the lessees, "would have nothing further to do with the contract" and that they were "through with it and would not go on and do anything further in it whatsoever" (*id.*, p. 27). The lessor refused to consent to the assignment and these statements were held to constitute "a true anticipatory breach" on the part of the lessees thus entitling the lessor to bring suit prior to the time fixed for performance and to recover prospective damages. In this respect the court further said:

"From the foregoing discussion it further follows that even if defendants' interpretation of the clause with reference to their time to perform under the lease is accepted we still would have a true anticipatory breach on defendants' part by reason of their repudiation of the lease which would entitle plaintiff to recover prospective damages." (*id.*, p. 30).

Olson's letter of June 13th stated Campos knew Olson was leaving and Olson testified that *he had told Campos the same thing prior to the letter* (R. 249). Olson by this letter discloses that he had "a legal mainland manager" and "commitments on the mainland". Any doubts that might have remained are dispatched by the final sentence: "However, I hereby state of my own free will that I will not be available for further matches in the Territory until further notice" (R. 247-248).

This constituted a total anticipatory breach of the unexecuted portion of the contracts which Campos was entitled to accept. Olson, of course, *did* come to San Francisco and did place himself under the exclusive management of Flaherty.

In *Crown Products Company v. California Foods Products Corp.* (1947), 77 C.A. 2d 543, the sellers under a three year contract for the sale of vinegar at a specific price

refused during the performance of the contract to make any further deliveries unless the buyer agreed to an increase in the price. The final statement by the seller upon the buyer's refusal to pay the increase was "very well, then, we are all through, I won't make any further deliveries." (*id.*, p. 547). The buyer immediately brought suit for damages for breach of the contract. Thereafter, the seller tendered delivery at the contract price which the buyer refused on the ground that the seller "had previously refused to carry out the terms of your contract with us" (*id.*, p. 547). On appeal the defendant seller contended that there was no evidence to support the finding that it had breached the contract inasmuch as it had tendered delivery at the contract price after the filing of the action which the plaintiff buyer had refused to accept. However, the appellate court held that the statements of the seller to the effect that it would not perform the contract constituted an anticipatory breach upon which the buyer was entitled to elect to bring suit and recover his prospective damage. In this respect the court said:

"The evidence heretofore set forth clearly refutes this contention. The testimony of plaintiff's attorney shows without ambiguity that defendant refused to perform and repudiated the contract unless an increase was granted. This repudiation, whether regarded as a present breach of an existing obligation to perform or as an anticipatory breach of an obligation which defendant had several months in which to complete performance, could not be retracted by the tender of 2,700 gallons made after suit was brought. *It is well settled law that in cases of anticipatory breach the bringing of suit is a sufficient election to treat the repudiation as a breach and to prevent its retraction* (5 Williston on Contracts (rev. ed.), p. 3723, sec. 1323; Restatement of Contracts, secs. 318, 319)." (*id.*, p. 551, emphasis ours.)

So in the present case Campos is entitled to treat Olson's repudiation as manifested in his statements to Campos and in his June 13th letter as a breach of the contracts and recover prospective damages.

The basis for the rule of "anticipatory breach" is stated as follows in the case of *Hawkinson v. Johnston* (1941, 8 Cir.), 122 F.2d 724 which involved the abandonment and attempted surrender of leased property by the lessees during the term of the lease:

"The rationale underlying the rule as declared in *Hochster v. De La Tour*, supra, certainly is as fairly applicable to contracts of lease as to other general contracts: 'The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.'

"The real sanctity of any contract rests only in the mutual willingness of the parties to perform. Where this willingness ceases to exist, any attempt to prolong or preserve the status between them will usually be unsatisfactory and mechanical. Generally speaking, it is far better in such a situation, for the individuals and for society, that the rights and obligations between them should be promptly and definitely settled, if the injured party so desires, unless there is some provision in the contract that, as a matter of mutual intention, can be said to prevent this from being done. The commercial world has long since learned the desirability of fixing its liabilities and losses as quickly as possible, and the law similarly needs to remind itself that, to be

useful, it too must seek to be practical.” (*id.*, p. 729-730)

In this view of the matter Campos’ statements at the meeting of June 19, 1951 or at any other time subsequent to Olson’s repudiation of the contracts are of no consequence whatever. Assuming that Campos gratuitously told Olson without qualification that he “could go and fight on the mainland”, nevertheless such a statement would be entirely consistent with an acceptance by Campos of Olson’s prior repudiation of the contracts as already shown. There was no consideration whatever for any suggested relinquishment of Campos’ right of action for Olson’s breach.

There is no dispute in this case as to the events that took place prior to the June 19, 1951 meeting—Olson’s letter, statements and actions. The dispute is over the conclusions to be drawn therefrom. Rule 52(a) *Federal Rules Civil Procedure*, 28 U.S.C.A., is not applicable to the situation as it existed prior to this meeting (*Plomb Tool Co. v. Sanger* (1951, 9 Cir.), 193 F.2d 260, 264). This court is free to make its own determination as to the legal conclusion to be drawn (*Brown v. Cowden Livestock Co.* (1951, 9 Cir.), 187 F.2d 1015, 1018).

As this court recently said in *Stevenot v. Norberg* (1954, 9 Cir.), 210 F.2d 615:

“When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings should not be set aside, unless clearly erroneous, but is free to draw its own conclusion.” (*Id.*, p. 619)

The conclusion that Olson did not breach his contract is not supported by any evidence and should be set aside by this court.

II.

**THERE WAS NO MUTUAL RESCISSION OF THE CONTRACTS
BY CAMPOS AND OLSON ON JUNE 19, 1951**

Viewing the June 19, 1951 meeting as the defendants will insist we must, and assuming *arguendo* that all Campos said was simply that Olson could go to the mainland, nevertheless, we submit that under the previous pressure by Olson due to the interference of Flaherty and his representatives, there was little else of any effect that could be said or done. Olson had made up his mind. He had flatly announced that he was leaving Campos; he went to the meeting of June 19, 1951 and told those present the same thing. Such a reply by Campos was entirely consistent with an acceptance on his part of Olson's prior repudiation of the contracts. There was absolutely no consideration for rescission (5 *Corbin on Contracts* 961). As a rescission is in fact a new contract (*Tuso v. Green* (1924), 194 Cal. 574, 582), it requires offer, acceptance and consideration.

In *Tuso v. Green* (op. cit.) plaintiffs' deed and defendant's \$300.00 (and later another \$700.00) were deposited with instructions in escrow with the bank. The agreement was that in case of default the payments were to be forfeited to the plaintiff seller. The buyer defaulted and by letter to the bank stated it would not be possible to make further payments. Plaintiffs did not respond to this letter but sold the property to a third person and brought the action against the bank for the \$1,000.00. With regard to defendant's contention that the contract was mutually abandoned and rescinded the California Supreme Court said:

"A rescission when effected by mutual consent is a new contract, to effect which there must be a meeting of the minds. It is true that the consent of the parties to such an agreement of rescission is not required to be

expressed in words, but may be manifested by conduct. But such conduct must afford a stronger basis for the inference of consent than mere conjecture or speculation. The letter of January 3d was not expressly or by necessary implication an offer to rescind. By it the appellant made no offer on his part except to pay the bank for the expenses of drawing the papers. Neither expressly nor by implication did he offer to restore the plaintiffs to substantially the same position as if the contract had not been made, nor did it contain any offer, expressed or implied, to do equity, notwithstanding it appeared inferentially therefrom that the defendant had been in possession and enjoyment of the premises for some time. Neither did it contain any proposal which called upon the plaintiffs to either accept or reject the same. It amounted to no more than a notification by defendant that he did not intend to further perform the contract. If by a process of liberal construction it could be deemed an offer of rescission we find nothing in the evidence which required the trial court to conclude that plaintiffs had accepted it as such."

One of the leading authorities on the law of contracts, Professor Corbin, takes the same view:

"It should be observed, however, that a mere expression of repudiation by one party [Olson] to a contract is not an offer of a rescission. *Acquiescence in such a repudiation by the other party [Campos] is not an acceptance of an offer of rescission and does not prevent the repudiation from being a breach of contract creating the usual remedial rights.* Thus, suppose that A [Olson], who is under a contract for the construction of a building for B (Campos), should tell B (Campos) that he is not going to perform the contract. B (Campos) replies: 'Very well, I shall at once get another builder.' This conversation is not operative as a rescission of the contract. *B's (Campos') duty to A (Olson)*

is indeed discharged by A's (Olson's) repudiation; but the repudiation is a breach of contract, for which B (Campos) can maintain an action for damages." (5 *Corbin on Contracts*, Sec. 1236, p. 961, insertions and emphasis ours.)

We furthermore submit that the view of the evidence contended for by defendants is clearly erroneous and is not supported by the facts. At the commission meeting after Olson's repudiation Campos did not simply tell Olson he could go and fight on the mainland (R. 119). Campos also said he would get Olson a trainer—the same as Lipton had arranged with Flaherty in 1946 when Olson first went to the mainland. Campos testified that at the meeting he insisted on retaining his management rights. Stagbar squarely corroborated Campos in this (R. 214-215) and Sterling supports Campos so far as remembering the discussion about Campos offering to get Olson a trainer (R. 277).

As already shown Campos had previously refused substantial offers to sell his rights under these contracts. He continued to assert his rights after Olson left in the same manner as he had when Olson left the first time in September, 1949. Campos did not at any time acquiesce in Olson's unilateral repudiation of the agreements nor can such an inference be properly made from the record in this case. In *Compania Engraw Commercial E. Industrial S.A. v. Schenley Distillers Corporation* (1950, 9 Cir.), 181 F.2d 876, this Court correctly sets forth the California law:

"A study of California decisions leaves no doubt that one contracting party cannot, by any unilateral act or declaration, destroy the binding force of a contract. These decisions make it clear that the effect of a one party repudiation is to give the promisee an election either to hold fast to the contract or to treat the repudiation as a termination for all purposes of perform-

ance. *Alderson v. Houston*, 154 Cal. 1, 96 P. 884; *Simmons v. Sweeney*, 13 Cal. App. 283, 109 P. 265; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 64, 85 P. 929, 8 L.R.A., N.S., 1171.

“The relevant inquiry to be made, then, is whether Engraw, either explicitly or implicitly at the time, treated Schenley’s repudiation as an ending of the contract.

“Nothing at all in the record indicates that Engraw then acquiesced in the repudiation. To the contrary, *Engraw continued to assert a continuing obligation of Schenley to take delivery of the glucose*. For several months discussions continued between the parties concerning means of liquidating the obligation of Schenley.

“The trial court appears to have assumed that, because Schenley, on the day it repudiated, specifically denied the existence of the contract, Engraw must be deemed to have then treated the contract as at an end. But we think that assumption to be unwarranted and indeed unrealistic. For experience teaches that seldom is a defrauding party inarticulate in the assertion of some plausible reason for default. And the most common of these excuses is that there was no contract at all! Our conclusion is that there is no justification in the record to support a holding that Engraw then acquiesced in Schenley’s unilateral repudiation.” (*Id.* p. 878, emphasis ours.)

The territorial commission’s attitude as expressed in Secretary Lee’s letter to Campos on July 9, 1951 (Exhibit 20) and in its minutes of July 2, 1951 (Exhibit 33) and October 8, 1951 (Exhibit 23) conclusively demonstrates that the commission regarded the contracts as remaining in full force and effect and more importantly that nothing had been said at the June 19th meeting to cause the commission to view the contracts as having been modified, cancelled or rescinded

in any respect whatever. The evidence is uncontradicted that no action was taken by the commission toward cancellation.

Modification of a written contract by oral agreement must clearly be shown by the evidence.

“Before courts will set aside solemn binding written contracts and substitute therefor oral agreements, proof of the latter *as to every element thereof, as well as execution, must be clear and convincing.*” *Houghton v. Lawton* (1923), 63 C.A. 218, 223; emphasis ours.

A similar view was taken in *MacKenzie v. Hodgkin* (1899), 126 Cal. 591, 598, which also involved a purported oral modification of a written contract, where the court said:

“A written instrument would afford but slight protection to the parties in such cases if it could be varied in this manner; a bailment could be converted into a sale, or a sale into a bailment, according as the interests of either party, after delivery of the goods might lead him to the belief, real or feigned, that the delivery had not been pursuant to the original writing, but under a subsequent oral arrangement.” (*id.*, pp. 598, 599)

Such a showing has not been, nor could it be made here.

Olson breached the Campos contracts by performing in subsequent boxing contests under the exclusive management of Flaherty and not under the direction of Campos (Exhibit 2, Sec. 5; Exhibit 8, Sec. 7). This alone is enough to constitute the breach under the express terms of the agreements. Olson’s repudiation of the contracts—while performing exclusively for Flaherty—excused Campos from any further demand or performance on his part and entitles him to recover in damages.

Thus in *Ross v. Tabor* (1921), 53 Cal. App. 605, the parties had entered into a three year agreement under which plaintiff was to furnish a certain quantity of bees and defendant agreed to care for them and increase the number of colonies. Also plaintiff was to furnish defendant with a house and automobile to be used in the work. A few months after the execution of the contract plaintiff found the house vacant and the automobile standing in the yard without oil or gas. Accordingly, he assumed that defendant had abandoned the contract and thereupon took the automobile home. Thereafter, neither party contacted the other for an explanation and plaintiff took over the care of his bees. He waited until the expiration of the contract period and then sued defendant for damages for failure to increase the number of colonies. Defendant claimed that he had not quit caring for the bees until plaintiff took back the automobile and that therefore plaintiff was first to breach the contract. On appeal from a non-suit against plaintiff the question was whether the evidence established a breach on the part of defendant. In this connection the appellate court held that the facts as they appeared to plaintiff were sufficient to go to the jury on the issue of whether defendant had first abandoned the contract—in other words, that such an abandonment if found by the jury constituted a breach of the contract for which defendant was liable in damages. With respect to the duties of plaintiff in the case of such a breach, the court said:

“Nor was it incumbent upon appellant to hunt up respondent and offer to return to him the automobile, or ask him to go back to the house that he had supplied for respondent’s use. The contract was a continuing executory contract, requiring of respondent continuous service over a three-year period. And if, as might be inferred from his conduct in leaving the house and the

automobile, respondent had abandoned his contract, thereby breaching it, *appellant was under no obligation to demand that respondent continue to perform his contract*. Respondent cannot escape liability because appellant did nothing other than to take steps to prevent a further loss and an increase of damages. The rule is that a party to a contract cannot take advantage of his own omission to observe the requirements of his contract. If he breaches the contract he cannot interpose the breach as a defense to an action on the contract. 'The rule is general that the right to rescind a contract rests wholly with the party who is without default. One cannot violate the contract himself and then seek a rescission on the ground that the other party has followed his example.' " (p. 612, emphasis ours.)

See also *Walker v. Harbor Business Blocks Co.* (1919), 181 Cal. 773 at page 778.

We submit that even under defendants' view of the evidence once Olson left Hawaii and appeared in San Francisco under Flaherty's management he breached his contract with Campos; that Campos without further performance or demand on his part became immediately entitled to sue for damages to recover the prospective value of the contracts as of that time which he elected to do by filing suit against Olson for \$50,000.00 damages in the state court in San Francisco on September 11, 1953 (Exhibit 25); and that meanwhile Campos was excused from all further performance under the agreements and was under no duty whatever to attempt to arrange fights for Olson whom he no longer controlled.

One federal court while not directly deciding the point here involved used the term "practical repudiation". Jim Braddock had left Madison Square Garden's auspices and agreed to fight Joe Louis instead of Max Schmeling. "There

was practical repudiation for the reason that a heavyweight boxer, through sheer physical limitations, cannot engage in two major contests involving the title of World's Heavyweight Champion within nineteen days." *Madison Square Garden Corporation v. Braddock* (1937, 3 Cir.), 90 F.2d 924 at page 926. Obviously, then, a "practical repudiation" occurred here when Olson met Hunter, originally procured by Campos, but in San Francisco on July 9th and under the management of Flaherty.

The curt reply of Jack Dempsey, then world's heavyweight champion, to a request by the Chicago Coliseum Club "* * * As you have no contract suggest you stop kidding yourself and me also. JACK DEMPSEY," was held to be a repudiation of a written contract between the Club and Dempsey entitling the Club to damages. This telegram was in response to the request of the Club that Dempsey have a physical examination as required by the agreement in order that his life could be insured in favor of the Club prior to the scheduled Dempsey-Wills fight. Dempsey was at that time training for a fight with Tunney (*Chicago Coliseum Club v. Dempsey* (1932), 265 Ill. App. 542).

Repudiation takes many forms.⁷ Olson's words and actions were certainly clear enough. It was his decision whether or not to repudiate his agreement but not at the expense of justice. "Liberty tweaks justice by the nose * * * and quite athwart goes all decorum."

7. "Such repudiation as will amount to a breach may take various forms showing a positive intention not to perform, other than a statement to that effect * * *. The same is true of denying the validity of the contract between the parties, or insisting that its meaning or legal effect are different in a material particular from the true meaning or effect, coupled with the assertion, expressed or implied in fact, that performance will be made only according to the erroneous interpretation." (5 Williston on Contracts, Rev. Ed., 3726-3727).

We submit that this Court should determine that the findings of the trial court on this phase of the case are clearly erroneous and should be set aside (Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.). As to the documentary evidence, depositions and exhibits, this Court is in as good position as the trial court to make the appraisal (*Equitable Life Assurance Society v. Irelan* (1941, 9 Cir.), 123 F.2d 462).

The judgment below is also based on findings by the trial court of waiver and abandonment on the part of Campos under the circumstances already indicated.

Abandonment is defined as the *intentional* relinquishment of a known right (*City of Los Angeles v. Abbott* (1933), 129 C.A. 144, 148). An intention to abandon expressed by an external act is included in this definition (op. cit.).

Waiver is defined as an *intentional* abandoning of a known right (*Webster's New International Dictionary*, 2d Ed.).

Campos' statement at the June 19th meeting that Olson could go to the mainland (R. 119) is the apparent basis for the finding on this point. This statement cannot be divorced from its context nor can the circumstances under which it was made be ignored. There is no evidence whatever in this record that Campos intended to waive or abandon his right of action which accrued on Olson's repudiation of the contracts. Furthermore the uncontroverted evidence of subsequent events squarely corroborates the Campos, Stagar and Sterling testimony that Campos expressly stated that he was retaining his contractual rights. There was no waiver or abandonment.

Thus the facts in *Steelduct Co. v. Henger-Seltzer Co.* (1945), 26 C.2d 634, are strikingly similar to this case.

Plaintiff had, as modified, a five-year exclusive sales agency contract with defendant. In February, 1939 defendant commenced negotiations with a competitor of plaintiff which culminated on April 1, 1939 with an exclusive sales agency contract between the competitor and defendant. In March of that year defendant wrote plaintiff “* * * we are terminating our agreement with the Steelduct Company on conduit and that we are making other arrangements. We would very greatly appreciate your giving us your disposition on the stocks we have immediately”. Plaintiff Steelduct Company replied that it expected defendant to maintain the contract. At the end of March there was a meeting between plaintiff’s president and Seltzer.

Seltzer testified of that meeting: “I told Mr. Collier, [plaintiff’s president] after hearing the statement of Mr. Stultz, [a customer] that I couldn’t see any use in our continuing under the circumstances” and Collier replied that “he couldn’t see that we were going to get very far either under the circumstances”. (id. p. 645, insertions ours.) Defendant contended there was a mutual abandonment. The Supreme Court reversed the judgment on the ground a verdict could not be sustained on the theory of mutual abandonment.

“Mutual assent to abandon a contract may be manifested by conduct of the parties. (*Treadwell v. Nickel* (1924), 194 Cal. 243, 259 [228 P. 25]; *Tuso v. Green* (1924), 194 Cal. 574, 582 [229 P. 327]; *Lohn v. Fletcher Oil Co., Inc.* (1940), 38 Cal. App. 2d 26, 30 [100 P.2d 505].) And if there was any material and competent evidence from which it can be inferred that plaintiff manifested such assent, it was proper to give the questioned instructions and the verdict must be sustained insofar as that issue is concerned. But it does not appear that the above summarized evidence, under any reasonable view, can give rise to such inference.

“The facts that plaintiff’s president urged defendants to perform the contract and sought to retain Stultz’s business do not prevent plaintiff from treating defendants’ renunciation as a breach or indicate that plaintiff agreed to the condition which defendants sought to impose. (Cf. *Alderson v. Houston* (1908) *supra*, at p. 7 of 154 Cal.) ‘Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out. * * *’ (*Tri-Bullion Smelting & Development Co. v. Jacobsen* (1916), 233 F. 646, 649 [147 C.C.A. 454]; see *United Press Ass’n v. National Newspaper Ass’n* (1916), 237 F. 547 [150 C.C.A. 429].)

“The evidence which seems most nearly to admit of an inference that plaintiff consented to abandonment of the contract is that (according to the testimony of Seltzer, which must be accepted as true in every reasonable implication favorable to defendants) Collier, in reply to Seltzer’s statement ‘that I couldn’t see any use in our continuing under the circumstances,’ said that ‘he couldn’t see that we were going to get very far either under the circumstances.’ The jury, however, had no right to detach this single statement from its context. *It was made at a time when defendants had announced and reiterated their refusal to perform their contract obligations. Only by disregarding uncontradicted evidence and indulging in definitely strained construction can it be taken to refer to anything more than the plaintiff’s efforts to induce defendants to perform their contract obligations.*” (Id. pp. 647-648, emphasis ours).

Olson had made up his mind to quit Campos to go to Flaherty and he certainly gave it enough publicity (*supra*

pp. 6-7). This is the atmosphere of the June 19th meeting of the Territorial Boxing Commission; this is the background of Campos' provisional consent to Olson fighting on the mainland; and it is also the foundation of the trial court's findings of abandonment and waiver. The truth that Campos never at any time waived or abandoned his contract rights must surely emerge from this logomachy.

III.

OLSON'S BREACH OF THE CONTRACTS WAS WRONGFULLY AND UNJUSTIFIABLY INDUCED BY THE DEFENDANT FLAHERTY

Assuming the breach of contract has been established it was unquestionably induced without justification by Flaherty. In September, 1949 he had prevailed upon Olson to sign the contract in San Francisco under which they are still operating although fully aware that Olson was already under contract with Campos (R. 320-321). Nothing came of it at that time because of Olson's suspension for failure to meet Johnny Duke in Honolulu as scheduled except that the contract itself, dated September 26, 1949, was filed by Flaherty with the California State Athletic Commission (Exhibit 9; R. 70). Olson was forced to return to Hawaii to fight Duke by the suspension (R. 103).

Accordingly this is not the case of an unknown fighter importuning Flaherty to take him over at the end of June, 1951 after having been released by his manager. Flaherty knew all about Olson's ability, particularly since his showing against Sugar Ray Robinson in late October, 1950 and he also knew that Campos was his manager. In fact he had entered into the settlement agreement of October 11, 1950 with Campos acting in that capacity (Exhibit 10; R. 70).

It is true that any connection between Leavitt and Flaherty in February, 1951 is based purely on inference

arising from the fact that Leavitt had been involved with Lipton and Flaherty in the management of Olson in 1946 and early 1947 (R. 315, 346). But it is equally true that Leavitt's failure to perform his agreement to produce six main event fights for Olson in early 1951 caused Olson's dissatisfaction with Campos which resulted in the part played by Miles.

Miles was an old and close friend of Flaherty (R. 318). In February, 1951 while Campos and Olson remained hamstrung by their commitment to Leavitt, Olson began talking to Miles about going back to Flaherty (R. 239). Miles advised him (R. 251) and advanced money to him (R. 240) and later, after the June 19th meeting, Miles paid Olson's transportation to San Francisco upon being authorized to advance the same by Flaherty (R. 252, 314).

Olson contacted Flaherty directly in May. Shortly after May 7th he wrote Flaherty saying that he wanted to come to the mainland (R. 241-243, see also R. 319). Flaherty replied that " * * * he had a contract on me (Olson), a California contract, that I had signed, *and that was a good contract.*" (R. 244, insertion and emphasis ours)—in other words, the contract of September 26, 1949 which Flaherty had obtained after notice that Olson was under contract with Campos.

After the June 19th meeting Miles promptly reported to Flaherty telling him that Olson was "about to come up" and as the result of this communication Flaherty arranged with Miles to pay Olson's transportation (R. 319). Olson left immediately and on his arrival in San Francisco "went right up to see Mr. Flaherty" and commenced training in his gym (R. 251-252).

On May 28th Campos had arranged for a bout in Honolulu between Olson and Chuck Hunter which was set for

June 19th (R. 116). This was postponed to July 3d (R. 75) and ultimately cancelled because of the unavailability of Hunter (Exhibits 17, 18; R. 75-76). Six days after the July 3d date, which had been cancelled by the Territorial Boxing Commission because of Hunter's unavailability, namely, on July 9, 1951, *Olson met Hunter in San Francisco under the management of Flaherty* (Exhibit 5, R. 312).

We submit that the foregoing overwhelmingly establishes Flaherty's unjustifiable interference with the contracts between Campos and Olson which entitles Campos to damages. As a matter of fact the mere taking over by Flaherty of the exclusive management of Olson under the terms of the contract of September 26, 1949 (Exhibit 9; R. 70) commencing with the Hunter fight on July 9, 1951, with knowledge of the existence of the prior exclusive agreements between Campos and Olson, is itself enough to constitute the tortious interference.

The doctrine concerning actionable interference with contractual relationships of others emerged in definite form in *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707) and is firmly established in American law. This is the rule in California (*Imperial Ice Co. v. Rossier* (1941), 18 C.2d 33; *California Grape Control Board, Ltd. v. California Produce Corporation, Ltd.* (1935), 4 C.A. 2d 242; *Speegle v. Board of Fire Underwriters* (1946), 29 C.2d 34; also see cases collected 26 A.L.R. 2d 1235) and in the federal courts in this district (*Sunbeam Corporation v. Payless Drug Stores* (1953 U.S. Dist. Ct. N.D. Cal. S.D.), 113 F. Supp. 31).

Thus in *Romano v. Wilbur Ellis & Co.* (1947), 82 C.A. 2d 670 the court approved a quotation from 41 Harvard Law Review (page 747) as follows:

“The interest in freedom from interference with contracts cannot be invaded with impunity in furtherance

of an interest in freedom to enter into contract relations, an interest less highly protected in the law than the interest in contracts. Therefore, if the defendant enters into a contract with a person, who is already under contract with the plaintiff, *with knowledge or surmise of the existence of the prior contract*, and of the fact that performance to the defendant will prevent performance to the plaintiff, he is merely furthering his interest to enter into contracts and he should not only not be able to recover on the contract which he has made, but should be held liable for inducing breach of contract, or be enjoined from interference, even though the prior contract does not give the third person a property interest.'” (id. p. 673, emphasis ours.)

The Restatement of Torts, section 766, cited with approval in the *Romano* case defines the cause of action as follows:

“Except as stated in Section 698 [marital situations] one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.”
(Insertion ours.)

In California the rule has been extended, as it has in most jurisdictions, to render unjustifiable interference with the contract of another actionable even though the *means* used to procure the breach are themselves *lawful*.

Thus in *Imperial Ice Company v. Rossier* (1941), 18 C.2d 33, *supra*, the Supreme Court of California said:

“It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action. (See cases

cited in 24 Cal. L. Rev. 208; 84 A.L.R. 67.) Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. (citing authority)." (*id.* p. 35)

The right of Campos to the exclusive services of Olson under their contracts was a property right concerning which Campos is entitled to protection (*California Grape Control Board, Ltd. v. California Produce Corporation, Ltd., supra*, (1935), 4 C.A. 2d 242, *Blender v. Superior Court* (1942), 55 C.A. 2d 24); and Flaherty's interference with knowledge of the contracts is an actionable wrong.

Flaherty caused the formation of defendant Sid Flaherty Promotional Enterprises, Inc. on June 7, 1954 (R. 321). This corporation received the compensation from Olson's bouts after that time and Flaherty continued as Olson's manager (R. 324). It thus clearly appears that Flaherty's continuous interference with the Campos-Olson contracts subjects the corporation to liability for its subsequent enjoyment of the fruits of this wrong (Civ. Code of Calif. 3521).

CONCLUSION

We submit that the judgment of the District Court should be reversed. It is also submitted that inasmuch as all the evidence pertaining to Olson's subsequent ring earnings stands uncontradicted in the record, this Honorable Court should direct the trial court to enter judgment for the plaintiff and against all defendants in an amount equal to the manager's share of Olson's earnings commencing with July 9, 1951 less one-third thereof which would customarily be paid to a mainland manager.

Dated: November 12, 1956.

Respectfully submitted,

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No. 15,183

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HERBERT CAMPOS,

Appellant,

VS.

CARL E. OLSON, also known as CARL
"BOBO" OLSON, SID E. FLAHERTY,
SID FLAHERTY PROMOTIONAL ENTER-
PRISES, a corporation, et al.,

Appellees.

REPLY BRIEF OF APPELLEES

**CARL E. OLSON, ALSO KNOWN AS CARL "BOBO" OLSON;
SID E. FLAHERTY; SID FLAHERTY PROMOTIONAL
ENTERPRISES, A CORPORATION.**

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FILE

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PAUL P. O'BRIEN, C



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Appellees.

REPLY BRIEF OF APPELLEES

**CARL E. OLSON, ALSO KNOWN AS CARL "BOBO" OLSON;
SID E. FLAHERTY; SID FLAHERTY PROMOTIONAL
ENTERPRISES, A CORPORATION.**

I.

THE EVIDENCE.

A. The five year agreement of *July 14, 1948*, between Campos and Olson, (Plaintiff's Exhibit No. 2) (R-61), which was approved by the Territorial Boxing Commission of Hawaii, and which was on Commission form, and which expired *July 13, 1953*, provided among other conditions:

Paragraph 1. The manager herewith engages the athlete and the athlete agrees for a period of five years from date of approval by the Territorial Boxing Commission of Hawaii, to render services solely and exclusively for the manager in such boxing contest, exhibitions of boxing, training exercises, *whenever required* by the manager in the Territory of Hawaii and elsewhere the manager may from time to time *direct*. (Italics ours.)

Paragraph 2. The manager agrees that the athlete shall receive 66-2/3 per cent of all sums of money derived by him from *any services that the athlete may render hereunder*.

Paragraph 3. The manager agrees to use his best efforts to secure remunerative boxing contests and exhibitions for the athlete.

Paragraph 6. The athlete shall attend to all training exercises, as the manager shall *require*, and shall proceed and travel by all boats, airplanes, and other means of conveyance as and when *required* by the manager for the purpose of this agreement. (Italics ours.)

B. The document of July 20, 1949, (Plaintiff's Exhibit No. 8) (R-67), which defendants allege is invalid and unenforceable, is a purported contract for 10 years' duration. This document *was never filed with nor approved by* the Territorial Boxing Commission of Hawaii. Pertinent provisions are:

Paragraph 1. That said party of the second part (Olson) for and in consideration of the sum of \$1.00 (One Dollar) and other valuable consideration to him in hand paid by said party of the first

part (Campos), the receipt of which is hereby acknowledged, agrees to, and by these presents does hereby, place himself under the management and supervision of first party, and also agrees to, and by these presents, does hereby obligate himself to take part in any and all such *boxing contests, athletic exhibitions, and other contests of physical skill, science and strength, and also to give exhibitions of boxing, training and training exercises, and also to act and perform as a comedian, actor or otherwise in motion pictures, vaudeville and theatrical performances whenever and wherever required* by the said party of the first part (Campos) in such places * * * *, where the party of the first part, his managers, may from time to time *request and direct*. (Italics ours.)

Paragraph 2. It is further understood and agreed, that the said party of the first part hereby engage the sole professional services of the said party of the second part to take in all such boxing contests, vaudeville and theatrical performances and otherwise, to the best of his skill and ability, at such times and places as aforesaid, that may be *required and directed* by said party of the first part. (Italics ours.)

Paragraph 4. It is further understood and agreed that said party of the first part shall use his best efforts and endeavors to secure appropriate and remunerative boxing contests, exhibitions, physical contests, motion picture, vaudeville and theatrical performances for the party of the second part during the term of this agreement.

Paragraph 5. It is understood and agreed that the net proceeds of all boxing contests, exhibitions, and contests and performances *herein*

*mentioned in this agreement * * * * shall be divided * * * *.*

C. The evidence showed that plaintiff Campos had no experience in the "fight" game prior to July 14, 1948, when the five-year contract with Olson was entered into (R-125). Campos was the manager of his brother's dairy farm and a bookkeeper (R-124). This occupation, which was practically full-time, continued during the years through 1951 (R-127). Further, Campos had another sideline during this period, "contracting" for hauling of manure and building homes (R-126-127).

D. The evidence shows that although Olson was a "rated" fighter in 1949 (Defendants' Exhibit B1-B6) by Ring Magazine, that in 1950 and 1951, while Olson was still under Campos' management, Olson *was not rated* by Ring Magazine. (See Ring Magazine and testimony by Mr. Spagnola) (R-356). Mr. Campos, though aware of Olson's 1949 standing, did not, on examination recall Olson's rating in 1950 and 1951 (R-144).

E. The evidence shows that from the date in October, 1950 (R-167-168) of the first Ray Robinson fight in Philadelphia, Olson was required to fight by Campos, and did fight only twice, those bouts being in Honolulu in March and May of 1951 for which Olson received the total sum of \$319.78, and for which Campos received \$294.30 (R-155-164) (Ptf. Exhibit No. 6).

F. The evidence shows that after the Robinson fight in 1950 (Plaintiff's Exhibits Nos. 29 and 30)

(R-121-127) it was evident, Olson was not in demand as a fighter. He was not considered as having services which were attractive or desirable (R-175).

G. Testimony of Olson (R-224-229, 246), Campos, and of the Commission members (see testimony of all Commissioners) (R-271; R-273, 274, 280; R-297; R-352; R-357; R-368, R-369) of the Territorial Boxing Commission indicate that during 1951 Olson and Campos had disagreements; that Olson complained of lack of fights and lack of money; that he, Olson, was not making a living (R-189). The Commission Minutes of February 1951 (Plaintiff's Exhibit No. 12) (R-72) substantiate this. Too, Campos was concerned (R-179-185) about the money he had "lent" to Olson, an alleged \$12,000.00.

H. Campos' testimony was that he lost \$5,000.00 in the fight game as Olson's manager through June 1951; and that Olson at that time owed him about \$12,000.00 (R-183).

I. In May of 1951 Campos advertised in the Honolulu newspapers to sell Olson's contract. (See testimony of Mr. Spagnola) (R-353-354). Mr. Spagnola offered Mr. Campos \$3,000.00 in May of 1951 for Olson's contracts. Mr. Campos rejected the offer stating he wanted \$7,500.00. Campos said "No, I want what the boy I think owes me and that's about \$7,500.00." (R-353.)

J. The evidence is clear that Olson always performed for Mr. Campos, whenever requested and whenever and wherever required and directed. There

is no evidence to the contrary (testimony Campos and Olson) (R-176-177).

K. The evidence was clear that no remunerative purses for fighting, especially after October 1950, were to be had in Hawaii, because the guarantee to "name" fighters to come to Hawaii was prohibitive (R-172-176).

L. At the informal June 19, 1951 meeting of the Hawaiian Boxing Commission the evidence is as follows:

James A. Spagnola (at R-352 on direct examination):

A. Well, he (Olson) stressed that he was having hardships, no fights, and his family was in distress, and that he would like to go elsewhere and seek fights that would give him some remuneration.

Q. Now what did Mr. Campos say, if anything?

A. Well I believe Mr. Campos didn't say anything, until the Chairman said something.

Q. What did the Chairman say?

A. The Chairman of the Commission then notified Mr. Campos, who was sitting at the end of the table, that would he in any way—would he be willing to let Carl go elsewhere to fight, and Mr. Campos said * * * I believe the Chairman also said, would he stop him in any way from trying to make a living and make money for his family. And at that time, *Mr. Campos, I recollect, said he would NOT stand in Carl's way in any manner, he could go anywhere he wanted to seek employment, and that was it. That's all that was said.* (Italics ours.)

Leon K. Sterling, Jr. (Direct examination by Mr. Clark, deposition page 10) (R-276):

Q. Was anything said at that meeting about Bobo going to the mainland?

A. Yes.

* * * * *

A. Yes, exactly who said it, I don't know, but Bobo said if he could go to the coast he could get some fights there. I don't recall exactly who said it. But if Bobo went to the mainland he could get fights there. (R-276).

Q. And do you remember what Campos replied to that?

A. I believe that Mr. Campos said that Bobo could go. (R-276).

A. Well someone said—exactly who said it I don't know, that if Bobo went to the mainland he could get fights and he kept busy, in other words. *It was all right with Campos. And I do believe that Campos said he would get him a trainer up there.* (Italics ours.) (R-277).

(Cross-examination by Mr. Ellis):

A. That subject came up of Bobo leaving *and being able to get fights on the mainland and Campos said that he could go.* (Italics ours.) (R-291).

A. I don't recall the money part of it. *I recall Mr. Campos saying he could go and fight.* But I don't recall the money part of it, the fact that the only reason he wanted to fight was to get the money back. I don't recall that, *But I do distinctly recall that he said he could go and fight outside the territory.* (Italics ours.) (R-294).

Robert M. Lee. (Direct examination by Mr. Clark, deposition, page 93, line 19):

A. At the meeting I referred to, they had discussed this matter of Olson leaving. They wanted to Clarify the thing, whether Campos was going to bring action against Olson at that particular time. *And then Campos said that Olson could go and that he wasn't going to deprive the boy or attempting to deprive him from attempting a livelihood, that the boy could go.* (Italics ours.) In Evidence. (R-400).

Sherman N. Dowsett. (Direct examination by Mr. Ellis, deposition, page 2, line 20):

A. Yes, I have forgotten who spoke up first but the crux of the matter was that Bobo Olson either asked for and got, or was given permission to leave the territory. And some mention was made * * * *the manager didn't wish to stand in the fighter's way as far as being able to make money as a fighter.* (Italics ours.) (R-391).

Mr. Clark. Or better himself.

The Witness. Correct.

A. Well, the only recollection I have of coming up other than the permission to leave the territory was a matter which had been brought up before which was some advances, usual advances on the part of a manager to a fighter, which were evidently owing, that Bobo evidently owed Campos some money. And in order to go away and possibly better himself or make a better living, Olson would be able to eventually, I guess, pay off his debts or advances that had been made to him by his manager. (R-391).

Q. Who made any statement about that. Was that Mr. Campos?

A. Mr. Campos—I don't know exactly how it was put, but there was money owing from fighter to the manager and in giving permission to go he felt that he would be able to recover the advances that he made to the fighter * * *. (R-392).

Q. Were there any limitations placed on Olson by Mr. Campos, as you recall. (R-393).

A. *He said he could go and better himself and to further his fight career.* (Italics ours.) (R-393-394).

Dr. Paul Withington. (Direct examination by Mr. Clark, deposition, page 50, line 4):

A. And at that meeting Olson expressed his desire to go to the mainland, that he wanted to go to the mainland, that he needed to earn money and he could get fights there and he wasn't getting them here. And he was particularly upset because of the cancelling of this Hunter fight on that date. And also at that meeting *Campos said that he did not want to keep the boy from making money and that they had talked it over and he was willing for him to go to the Coast to make money.* (Italics ours.) (R-301).

A. *Yes, that he did not want to stand in the way of the boy making some money.* (Italics ours.) (R-302).

J. Donovan Flint. (Direct examination by Mr. Ellis):

Q. What was said by any one at that meeting in relation to that matter? (R-368).

A. Well, I remember Bobo Olson stating that he was not able to earn a living in the Territory of Hawaii as a boxer and that he was desirous of leaving there for other fields. I remember Mr. Campos stating that *Bobo Olson owed him some money, and then I also remember Mr. Campos stating that he would not stand in the way of Bobo making a living for himself and family*, but that he wanted back the money Bobo owed him from advances and different things, from money borrowed. And that is what I remember about the meeting. (Italics ours.) (R-368-368).

Q. Do you remember any statement by Mr. Campos that Olson might go to the mainland?

A. He stated he did not care where Olson, or Mr. Olson went, as long as he got paid the money he was owed, and he would not stand in the way of Olson making a living (R-369).

A. I remember no discussion, I do remember at the meeting of the 19th, or whatever date it was, that there was no mention made at that meeting of withholding any purses of $\frac{1}{3}$ commission. All that Mr. Campos wanted was the money back that he owed him (R-373).

Thomas Miles. (By Mr. Ellis, R-378, 379):

The Witness. Mr. Olson complained to the Commission that day about Campos' relationship with him and asked that the Commission take action to allow him to seek employment in the boxing field in a field other than Honolulu. I am not sure whether Mr. Spagnola interceded for him or whether Carl made this request directly, but one, either Carl or Mr. Spagnola did take it up with the Commission that day, and it was said he wanted to leave and come to California to box.

I think the Chairman, who was sitting on my right, then asked Mr. Campos, who was sitting at the other end of the table, whether or not it was all right for Olson to come away in so far as he wasn't obtaining proper employment in the field of boxing in Hawaii, and Mr. Campos *said that he could go, that he wouldn't stand in the way of Olson earning a livelihood, and that if he could better himself that way, that he certainly would not stand in his way, he would let him go.* (Italics ours.)

Carl Olson. (Direct examination by Mr. Ellis) (R-404):

A. Well, I told the Commission, that I wasn't getting any fights, that I wanted to go to the mainland because I had no money and my family didn't have enough to eat. So they called on Herbert Campos and *Mr. Campos said that he is not stopping me from making a living, I can go anywhere and fight. So I left.* (Italics ours.)

Arthur Stagbar. (Direct examination by Mr. Clark) (R-214):

A. As I recall—I don't know who brought it up—Olson or Campos—but I do recall this specifically that *Campos said he had no objection to Bobo going to the mainland, that everybody is entitled to make a living, and he would permit him to go to the mainland, but that he would still retain his management rights.* (Italics ours.)

A. I know during the course of the conversation that came up that he was willing to let Olson go to the mainland, that he wouldn't *in any way step in to try to stop him, that he would let him go to earn a living.* (Italics ours.) (R-222).

Herbert Campos (on direct examination by Mr. Clark), (R-119) stated that Olson wanted to go to the mainland to fight under Sid Flaherty. Campos stated that Olson could go to the mainland to fight, that Campos would not stand in Olson's way, that Olson could go to the mainland provided Campos retained his contract rights.

On Cross-examination, Campos testified he consented to Olson's going to the mainland to fight. (R-190-191).

M. There is no evidence at all that Campos contacted Olson in any way, shape or manner after June 19, 1951 to provide a trainer, to provide a fight, to require Olson to fight, or to request Olson to fight.

N. There is evidence that commencing in 1951 there was disagreement between Olson and Campos, mainly over proper and remunerative fights. Campos, Olson, and the Records of Minutes of Commission meetings testify to this (see exhibits of Commission meetings and testimony of Commissioners).

O. There is no evidence that Campos provided any radio, vaudeville or other type of theatrical performances.

P. There is no evidence that Campos asserted any rights of management after June 1951.

Q. There is evidence (Defendant's Exhibit D) that Campos and Olson settled their financial problems in Superior Court Action in the City and County of San Francisco, State of California, in 1952. *This judgment was paid* (R-183-187).

R. There is no evidence that under any agreement, Carl Olson was required to reside in Hawaii.

S. There is no evidence that Sid Flaherty had anything to do with or proximately caused Olson to leave Hawaii in June of 1951 (Flaherty R-312-344).

T. The evidence shows that it was not until after Olson had won the American Middleweight Title from Paddy Young in the summer of 1953, and that Olson was scheduled to fight Randy Turpin for the Middleweight Championship of the World in the latter part of 1953, that Campos then first filed an action in the State Courts in 1953, September 11—Plaintiff's Exhibit No. 25.

U. The evidence shows that after July 14, 1953, the Hawaiian Boxing Commission did not recognize Campos as Olson's manager as the 1948 contract had expired (R-383-384). As a matter of fact Sid Flaherty was recognized as Olson's manager by the Hawaiian Commission in 1954 (R-334-335).

V. The evidence shows under Rule 99 of the Commission that the Commission had the authority to review contracts after three years.

W. The evidence shows Campos was never licensed as a boxing manager in the United States, except Pennsylvania, and not in Hawaii after 1953 (R-152-153).

II.

ARGUMENT.**A. THE CONTRACT OF 1948 AND THE ALLEGED 1949 CONTRACT WERE MUTUALLY ABANDONED.**

This is obviously a case of an individual, Herbert Campos, who like some others, wanted to get into the mysteries and intrigues of the fight game. He had no experience in the game, when in 1948 he signed Olson to a contract for five years. Later, in 1949 he attempted to sign Olson, and did sign him to what defendant Olson alleges was an invalid ten-year-contract, in Hawaii, never approved by the Commission. Herbert Campos was learning fast.

However, as happens, the fight game did not turn out as anticipated by Herbert Campos. The glamour of the game was lost in the hard reality of the facts. Within three years of the 1948 agreement, Campos had lost considerable money; he was owed considerable money by his protégé Olson, from advances. Under a 1948 contract he had a middleweight who, though once rated in 1949 was not rated in 1950 and 1951, and in 1951 this middleweight was no long a drawing card. Remunerative fights were not available and could not be obtained. The financial outlook and prospects for Campos were bad. It called only for more advances, more expenses for training. This was not a bright prospect for a business man. The future looked bleak. Meanwhile, the boxer Olson was also dissatisfied. He wasn't getting remunerative fights, his family was in dire condition. He was trying to make a living driving a cab and even the auto had been repossessed by the finance company.

Campos, the business man, after the financial failure of the Marshall fight in May of 1951 sought to sell Olson. He advertised in the Honolulu newspapers. A Mr. Spagnola offered \$3,000.00, but the business man Campos wanted \$7,500.00, which he felt would be closer to salvaging his advances to Olson. There was discouragement from the mainland that Olson wasn't desirable as a fighter.

Both Campos and Olson had made a "bad" deal. It hadn't worked out for either one. This was the background and setting for the June 19, 1951, informal meeting. Incidentally, this was almost three years from the date of the July 14, 1948 contract, within which the Athletic Commission of Hawaii under the power vested in it by Rule 99, in evidence, had the right to review. This was an obvious case to allow the contractees to abandon or rescind their agreement.

It was in this atmosphere that the June 19, 1951 meeting was held with the mutual consent of Olson and Campos. The purport of the meeting, the intent of the parties, the language used, as the evidence shows, is that the parties wanted to get rid of each other. Each was a burden to the other. *The parties, at that meeting abandoned the contract.* The great weight of the evidence, as reviewed supra, is to that effect. See the following cases in point on mutual abandonment:

Waldtoufel v. Sailor, 62 C.A.2d 577, 144 P.2d 894;

Treadwell v. Nickel, 194 C. 243; 228 P. 25, at 31, 32;

Gillis v. Gillette, 184 F.2d 872;
Hale v. Campbell, 46 F.Supp. 772;
Atlas Petrol Co. v. Cocklin, 59 F.2d 571;
City of Del Rio v. Ulen Contract Corp., 94 F.2d
 701;
McCreary v. Mercury Dr. Distributors, 124 A.
 2d 477; 268 P.2d 262;
Griffin v. Beresa, Inc., 143 A.C.A. 339.

In effect plaintiff effectively repudiated the agreement, and Olson relying on the statements of Campos thereafter changed his position by going to the mainland, bringing his family there, by engaging a manager, a trainer, and undergoing expense. This was all something Campos knew must necessarily occur, and his continued action after the meeting (to be discussed) did not set aside his estoppel. See *Nemarich v. Christenson*, 87 C.A.2d 844; 197 P.2d 785.

The meaning of the contract, or oral abandonment, is to be determined from the acts of the parties. The effect and meaning of the words will be given by this conduct.

In *Mitau v. Roddan*, 149 Cal. 1; 84 P. 145, at page 150, the Court said:

“Parties to a contract have a right to place such an interpretation upon its terms as they see fit even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of the contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the Courts will follow the

practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to its own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention; than they are when subsequent differences have impelled them to resort to the law, and one of them seeks a construction at variance with the practical construction they have placed on it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation, which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulties.”

See *Griffin v. Beresa, Inc.* (supra), 143 A.C.A. 339.

In the case at bar, after the June 19, 1951 meeting at which this new oral agreement took place, the parties acted upon it and executed it. Olson went to the mainland as indicated. He secured the services of a manager, Sid Flaherty, and under his direction,

became the Middleweight Champion of the World. Campos, after the meeting never asserted any so-called managerial *rights directly to Olson*. He never provided a trainer for Olson. He never required Olson to fight. He never requested Olson to fight. In 1952, he brought suit for moneys allegedly due for advances, which was settled and which was paid. It was not until September 1953, more than 2 years after the June 19, 1951 meeting that Campos, seeing that Olson was American Champion and on his way to the "big" money, asserts a claim or right in the State Courts of California. The actions and the conduct of both parties definitely prove an abandonment was intended to and did take place on June 19, 1951. Actually Campos wanted to get "rid" of Olson. It was a bad deal. He wanted to relieve himself of his managerial burdens, and the necessity for further advances. The evidence all supports this conclusion.

**B. THE EVIDENCE SHOWS NO BREACH OF THE 1948 CONTRACT
AND THE ALLEGED 1949 CONTRACT.**

In any event, though, the great weight of the evidence proves the parties abandoned the contracts alleged, it is apparent that Olson committed *no* breach of the alleged agreements under any of the evidence.

We start with so-called "exclusive" contracts between Olson and Campos. The key as to what happened lies in the meeting of June 19, 1951 before the Hawaiian Commissioners.

There can be no doubt from all the evidence as restated supra that Mr. Campos consented to Olson's leaving Hawaii to go to the mainland to fight, and that Mr. Campos would not stand in Olson's way. This can mean only one thing. It was obvious that Olson, in order to fight, would necessarily have to leave, would necessarily have to license himself in the mainland, would necessarily have to secure trainers, would necessarily have to secure a manager, and would necessarily have to undertake all action to foster and promote his boxing career. There can be no breach of contract under these conditions.

It is a maxim of the law, that he who consents to an act is not wronged by it.

California Civil Code, Sec. 3515;

Hill v. Berry, 79 C.A.2d 771;

Estate of La Belle, 93 C.A.2d 358; 208 P.2d 432.

Further, after having consented to the act, and not being wronged, the promisor cannot change his purpose to the injury of another. *California Civil Code, Section 3512.*

Thus it is clear that by intent of the parties the so-called "exclusive" contracts could no longer be exclusive, by the very nature of the fact of consent.

It necessarily followed that Olson would enter into a relationship with another manager, which he did. We are not, in this action, concerned with that relationship, but only the rights as between Olson and Campos. For after June 1951 Campos never required Olson to perform under the 1948 agreement, nor under

the alleged 1949 agreement. There is no evidence that Olson would not have performed. The fact that Olson had an arrangement with Flaherty under a contract dated September 1949 is of no significance. The validity or invalidity of the Olson-Flaherty arrangement is not before the Court, although plaintiff argues strongly that in October 1950 Flaherty released Olson from that arrangement. (See Plaintiff's Exhibit No. 10.) In any event Olson, the subject matter of the contract between Campos and Olson, was in existence, capable of performing. The fact that he fought on the mainland was in accord with Campos' statement of June 19, 1951. Thus, strict performance of a contract may be waived.

Pasquel v. Owen, 186 F.2d 263;

Williston Contracts, Vol. 3, Revised Edits., Sec. 1969, et seq.

Further when the party acts on the words and conduct of another, and changes his position in reliance thereon, that other person may not change his assurance he has given another. An estoppel arises.

American Nat. Bank v. Sommerville, Inc., 191 C. 364, at 373; 216 P. 376;

Davenport v. Stratton, 24 C.2d 232, 149 P.2d 4;

Altman v. McCollum, 107 C.A.2d Supp. 847;

Shore v. Crain, 50 C.A.2d 736.

And, as a matter of fact, the facts show that Campos never objected to Olson fighting for Flaherty—*never to Olson*. He only, in 1952, demanded the money advanced to Olson, which was settled and paid. In 1953, Campos sued in the State Courts of California for a

one-third share of purses. Never did he require Olson to perform—never did he—to Olson—repudiate the consent given to fight, nor could he, as he would have been estopped. Not having performed himself, Campos is entitled to nothing.

To enforce the 1948 contract and/or the alleged 1949 agreement would be to allow plaintiff to receive substantial sums of money, without having rendered to or without having attempted to render to defendant Olson any performance, service or consideration. This was the case from June 1951 to date, especially so since Campos in 1952 received his just dues by way of settlement of his money claims.

A Court sitting in equity, will not enforce an agreement which thus would be harsh, oppressive, unfair and inequitable. Equity must be done by plaintiff and plaintiff must have contributed something to defendant (*Jacklich v. Baer*, 57 C.A. 2d 684).

Plaintiff failed to perform before and after June 19, 1951, the evidence shows. But limiting this argument to the time after June 1951, plaintiff's failure to perform precludes him from recovery. He could not just sit back and do nothing.

As *Williston* in Section 1015, page 2794, on Contracts points out, this type of contract is basically for the employee or fighter where work will increase his skill, connections and reputation. The employer (manager) is duty bound to furnish that work. This Campos never did.

It is a strange conclusion reached by plaintiff in his brief that Olson breached his contract. The whole

argument of plaintiff is predicated on an *assumption of a breach*, and his cases all go to discussing law, which assumes a breach. The answer to this is simply, that Olson, under the 1948 agreement and 1949 alleged agreement, had to do nothing *unless required* and after June 1951 Campos *did not require* Olson to do anything.

There was a duty, a burden on Campos to get Olson fights, to provide trainers, to handle and manage his boxing career, which Campos did not do, and was happy and relieved not to do. Thus, the question argued at length by plaintiff that Olson prevented performance and excused plaintiff is not valid. Olson prevented nothing. Olson did nothing but act in accord with the consent Campos had given him, and which both he and Campos understood as evidenced by their later conduct and relations to each other.

See *Mitau v. Roddan*, *supra*.

C. CASES CITED BY PLAINTIFF ARE NOT IN POINT.

There is no evidence that Olson would not have fought for Campos if required. There is evidence by Campos to the effect that he procured no fights for Olson subsequent to May 1951.

Ross v. Tabor, 53 C.A. 605, is not in point for there the Court had found that defendant had abandoned the contract, under conditions where defendant just left and disappeared. *There was no meeting between the parties, no discussion, no consent, no modification prior to that as in our case.* We do not quarrel with

general principles of law, but we do insist that the law be applicable to the facts. The case arose on non-suit and only states the law to be that *if defendant had abandoned his contract*, plaintiff need not further perform. *This is not our case.* Olson's obligation to perform depended on Campos' requirement. This is a peculiarly singular type of contract. It was a *condition precedent on the part of Campos* to require Olson to perform.

This case, along with others cited by appellant, is not in point for the reasons expressed.

See *De La Falaise v. Gaumont British Pict. Corp.*, 39 C.A.2d 461, at 468, where it is held it is well recognized that failure to comply with the condition precedent (there notice to engage in a movie) will prevent an action by the defaulting party to enforce the contract.

D. THE DOCTRINE OF ANTICIPATORY BREACH IS NOT APPLICABLE.

In support of plaintiff's position, a letter dated June 31, 1951, signed by Olson *directed and addressed to the Territorial Boxing Commission of Hawaii* (Plaintiff's Exhibit No. 35), and delivered to the Commission June 14, 1951, is relied on. This is *five days* before the *June 19, 1951 key meeting*.

There is no evidence in the record that Campos knew about this letter prior to the June 19, 1951 meeting, or at that time. It was not addressed or delivered to him. Obviously this letter was found in

the Commission files long after the meeting of June 19, 1951, and in anticipation of this lawsuit when the files were searched. The letter was not brought up or discussed at the June 19, 1951 meeting.

The law is clear. In *Patty v. Berryman*, 95 C.A.2d 159; 212 P.2d 937, at page 170, the Court said:

“Moreover the conversation was with Huston, not Patty (the Plaintiff). Just how a conversation with Huston, with whom Berryman (the defendant) had no contractual relations, could constitute an anticipatory breach of the contract between Berryman and Patty does not appear. Section 318 of the Restatement of Contracts, in illustration No. 3 gives the following example: A and B enter into a bilateral contract to sell and buy goods during the following month. Before the time for performance arrives, A tell C, *a third person having no right under the contract*, that he intends not to carry out his contract with B. C informs B of this conversation though not requested so to do by A. *A has not committed an anticipatory breach.*” (Italics ours.)

This is the case at bar, even assuming such a repudiation took place by Olson, which it did not.

It is the law that the alleged renunciation of a contract by a promisor before the time stipulated for performance is not effective unless such repudiation is unequivocally accepted by the promisee (*Robinson v. Raquet*, 36 P.2d 821; 1 C.A.2d 533).

In our case there was no communication to Campos, and no acceptance, which there obviously could not be. As a matter of fact, Campos on June 19, 1951 by

his own testimony was insisting on his contract rights. Further an alleged renunciation may be withdrawn before acceptance (*Bu-Vi-Bar Petrol Corp. v. Krow*, 49 F.2d 488).

Obviously, the parties here, Olson and Campos, requested a meeting of the Commission to "iron out" their rights. This was held on June 19, 1951, especially at Olson's insistence, as the record shows. The intent of the parties is thus clear. The meeting of June 19, 1951 supersedes any previous uncommunicated (to Campos) statements from Olson. It was there that the parties made statements which the trial Court construed as determining the rights of the parties.

Further, any alleged renunciation must be absolute and unequivocal. A mere expression of intention is not enough (*Atkinson v. District Bond Co.*, 43 P.2d 867; *Wilton v. Clarke*, 80 P.2d 141, 142).

In analyzing the letter (Plaintiff's Exhibit No. 35), Olson writes the Commission expressing dissatisfaction with Campos. He asks the Commission to investigate Campos' actions looking to a hearing by the Commission. Olson states he intends to carry out the Hunter contract and perform, looking to the Commission as to his rights. He qualifies his unavailability for further matches in the Territory by giving notice.

Under no practical construction can this be a clear, unequivocal renunciation. But this is unimportant because, as indicated, *Patty v. Berryman*, supra, is decisive of the point raised. There was no communi-

cation to Campos by Olson. Further the intent of both parties was to clear the atmosphere on June 19, 1951 at the Commission meeting. At that time, both Olson and Campos recognized rights and obligations under the 1948 agreement. A solicitation of the aid of the Commission was sought. This is reflective of the true intent of Olson and Campos.

Further there was no performance due by Olson to renounce and none was requested by Campos.

One cannot renounce what does not exist. Thus the cases cited by appellant are not in point on the facts.

E. NO WRONGFUL INDUCEMENT OF BREACH OF ALLEGED CONTRACT BY DEFENDANT FLAHERTY.

To establish plaintiff's second cause of action, the evidence on behalf of plaintiff must show that the contract which would have otherwise been performed, was breached and abandoned by defendant Olson, by reason of the wrongful act of Flaherty, and that such act of Flaherty was the moving cause, and unless the act complained of is the proximate cause there is no liability.

Hill v. Progress Co., 79 C.A.2d 771, at page 780; 180 P.2d 956;

See also *Johnson v. Union Fur Co.*, 31 C.A.2d 234; 87 P.2d 917;

See also *Augustine v. Trucco*, 124 C.A.2d 229; 268 P.2d 780.

It is necessary to prove that defendant intentionally and actively induced a breach of contract (*Augustine v. Trucco*, supra) (*Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34; 172 P.2d 867).

Augustine v. Trucco, supra, lays down the necessary elements to be pleaded and proved under plaintiff's second cause of action.

1. The existence of a valid, legal contract between A and B.
2. The alleged wrongdoer's, C, knowledge of the existence there of a valid contract between A and B.
3. C's intentional and *active inducing* of a breach thereof without justification.
4. Proximate Cause (citing *Hill v. Progress Co.*, supra).
5. Damages.

Further under the doctrine of *Case v. Kadota Fig Assn.*, 35 Cal.2d 596 (at 605); 220 P.2d 912, there must be a breach of contract, for if no breach occurred, no wrong can be charged to one said to have wrongfully induced the breach.

The action is one based on tort (*Elsbach v. Mulligan*, 58 C.A.2d 354; 136 P.2d 651).

It is obvious that there is no evidence whatsoever, except by far-fetched conjecture, that defendant Flaherty in any way interfered with any contractual relationship which existed between plaintiff Campos and defendant Olson.

F. IN ANY EVENT, ANY ALLEGED INTERFERENCE BY DEFENDANT FLAHERTY WITH ANY CONTRACTUAL RELATIONSHIP BETWEEN PLAINTIFF CAMPOS AND OLSON WOULD BE BARRED BY STATUTE OF LIMITATIONS. THIS DEFENSE IS RAISED BY ANSWER.

Plaintiff's second cause of action against defendant Flaherty is one based on the theory of the wrongful conduct of defendant Flaherty in allegedly inducing Olson to breach the alleged agreements with plaintiff.

The law is well settled that this course of action is one in tort (*Elsbach v. Mulligan*, 58 C.A.2d 354, 136 P.2d 651).

The applicable *California Civil Code of Procedure* sections are 339(1), which prescribes a 2-year statute of limitations for "an action upon a contract obligation *or liability* not founded upon an instrument in writing. . . ."

It has been held in *Lowe v. Ozmun*, 70 P. 87 (Cal.) (1902), that the term "liability" as used in Section (339(1) of the Code of Civil Procedure includes *responsibility* for *torts* and is applicable to *all* actions at law, not specifically mentioned in the statutes.

Further Section 340(3) of the *California Code of Civil Procedure* sets up a one-year period of limitation for . . . an action for . . . injury to . . . one caused by the wrongful act . . . of another.

A legally protected interest or property right which is invaded is caused "injury" within the Statutes of Limitations applicable to injury to persons (*Luellen v. City of Aberdeen*, 148 P.2d 849; 20 Wash.2d 594).

The tort of interference with a contractual relationship, or the inducement of a breach of a contractual relationship, is *not a continuing* tort. See *Hagan Corp. v. Medical Society of New York County*, 96 N.Y.S.2d 286 (1950).

That the Statute of Limitations commences to run from the *alleged* breach of contract by Olson, to wit, June 27, 1951, and is a two-year period. (See *Lowe v. Ozman*, 137 Cal. 257, 70 Pac. 87; *Lattin v. Gillette*, 95 Cal. 317; *California Code of Civil Procedure*, Section 339(1).)

The case of *Romano v. Wilbur Ellis Co.*, 82 C.A.2d 670, 186 P.2d 1012, cited by Plaintiff's Brief, merely holds that where defendants are *charged by pleading with appropriate allegations of fraud and false representation* which are alleged to have induced a breach of a contractual relationship, a three-year-statute of limitations is involved.

However, our present case *is not* one in which either *fraud is pleaded or proved*, nor any reliance on any alleged misrepresentations or right to rely.

The Restatement of Torts, Section 766, at page 51, develops the historical background of this type of action. The gist of that section is that there may be *non-tortious methods* of inducement of alleged breaches of contract. *Fraud is no factor*. Therefore, Section 339(1) Code of Civil Procedure creating a two-year period of limitation would be applicable. This defense was raised by the pleadings.

G. IT IS FURTHER TRUE THAT THE APPELLATE COURT SHOULD NOT DISTURB THE TRIAL COURT'S DECISION ON A FINDING UNLESS IT IS CLEARLY ERRONEOUS.

In this case, the trial Court heard and saw the plaintiff Herbert Campos, the defendants Carl Olson and Sidney Flaherty, and also James A. Spagnola, Thomas Miles and J. Donovan Flint, all of whom, except Flaherty, attended the June 19, 1951 Commission meeting. Flint was a commissioner at the time. Their testimony and appearance adequately gave the trial Court a true picture of the events at Honolulu on June 19, 1951, from which the trial Court drew its conclusions, *and it can hardly be stated* that, with that testimony before the Court, that the findings are clearly erroneous. The evidence clearly supports the findings.

H. SUMMARY.

It is submitted that it is apparent that the case at bar is simply one of an individual, Mr. Campos, who has given nothing to another, Mr. Olson, and who was repaid any legitimate obligation, seeking to impose a 10-year servitude upon Olson based upon what defendants allege is, in any event, an invalid, unenforceable 10-year agreement. There is no evidence that Olson breached any agreement, or that Flaherty induced any alleged breach of an agreement. The evidence simply indicates a consent by Campos for Olson to do exactly what Olson did. On no theory of equity should Campos recover; his own actions estop him. The intent of Campos and Olson on June 19, 1951 is

determined from their conduct between themselves thereafter. There is no basis in fact or in law for Campos to be awarded relief. The pertinent question asked by the trial Court, to wit, wherein did Olson breach the alleged contracts, is still unanswered.

It is respectfully submitted that the judgment of the District Court should be sustained.

Dated, San Francisco, California,
December 10, 1956.

HOWARD C. ELLIS,
BERNARD B. GLICKFELD,
Attorneys for Appellees.



No. 15,183

In the

United States Court of Appeals

For the Ninth Circuit

HERBERT CAMPOS,
Plaintiff and Appellant,

v.

CARL E. OLSON, also known as CARL "BOBO"
OLSON; SID E. FLAHERTY; SID FLAHERTY
PROMOTIONAL ENTERPRISES, a corpora-
tion, et al.,
Defendants and Appellees.

Reply Brief of Appellant, Herbert Campos

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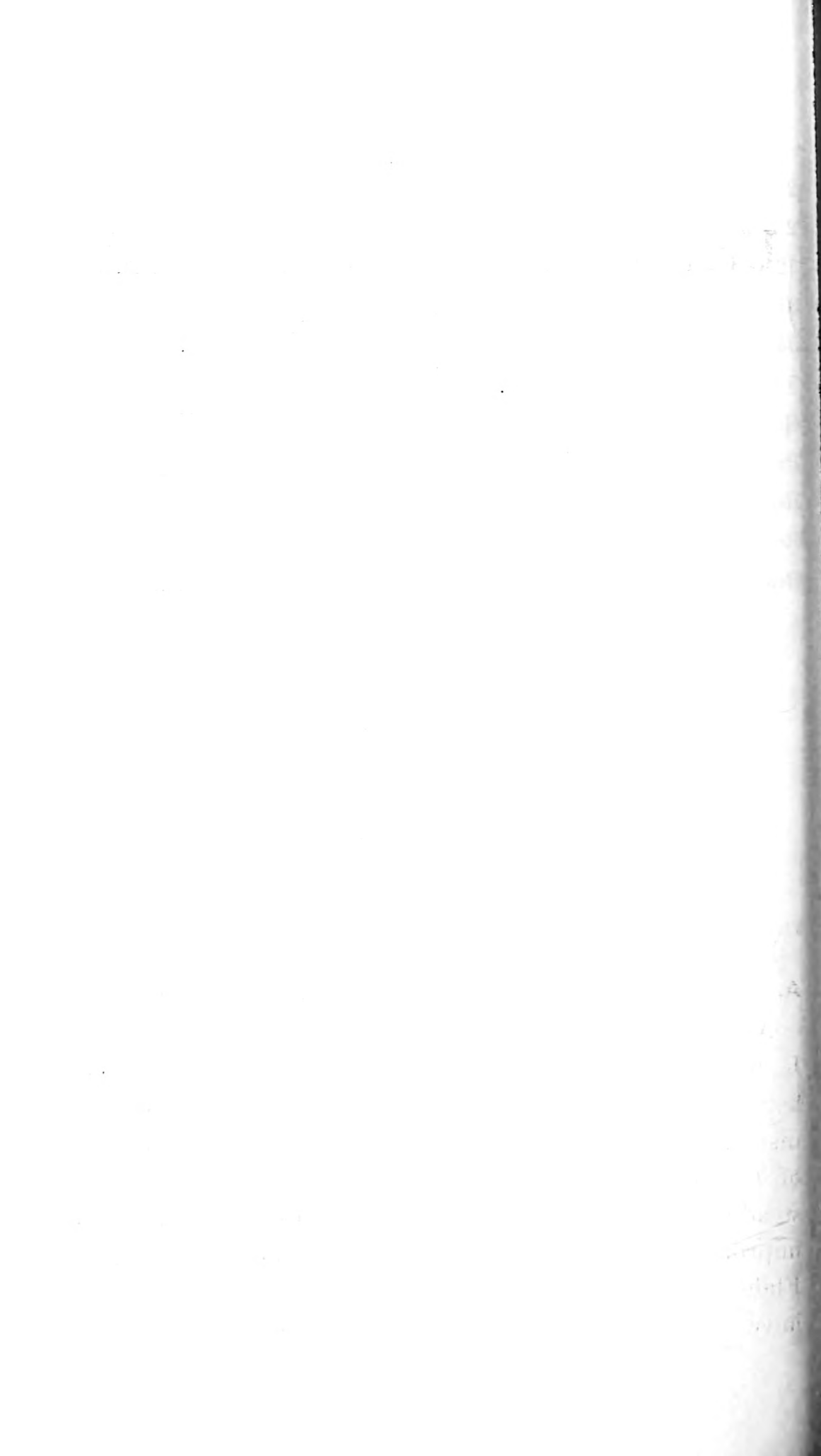
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No. 15,183

In the

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HERBERT CAMPOS,
Plaintiff and Appellant,

v.

CARL E. OLSON, also known as CARL "BOBO"
OLSON; SID E. FLAHERTY; SID FLAHERTY
PROMOTIONAL ENTERPRISES, a corpora-
tion, et al.,
Defendants and Appellees.

Reply Brief of Appellant, Herbert Campos

We will herein briefly answer some of the arguments raised by Appellees' brief.

A. The Argument that the Contracts Were Mutually Abandoned.

Appellees' view that the July 14, 1948 contract (Exhibit 2, R. 61) and the July 20, 1949 contract (Exhibit 8, R. 99) between Campos and Olson were mutually abandoned is insupportable. In spite of appellees' depreciatory picture of Olson while under Campos' management, Olson was steadily improving as a boxer at that time. A fighter as unpromising as that depicted certainly would not be told by Flaherty that Flaherty had a good contract on him (R. 244), have his travel expenses from Hawaii to San Francisco

advanced (R. 240) and upon arrival in San Francisco immediately fight under Flaherty's management (Exhibit 5; R. 312). The discouragement from the mainland that Olson was not desirable as a fighter came from Flaherty (Exhibit 30, R. 122).

In view of all that happened prior to the June 19, 1951 Commission meeting and what was said at that meeting, there was no abandonment nor was any intended. In the attempt to show abandonment Olson is pictured going to the mainland, securing the services of a manager and fighting his way to the world's championship while Campos does nothing. Campos' letter of June 27, 1951 to the Territorial Boxing Commission (Exhibit 19, R. 78), his radiogram of July 6, 1951 to the California State Athletic Commission (Exhibit 21, R. 81) and his letter of October 8, 1951 to the Territorial Boxing Commission (Exhibit 22, R. 82) are not from a person who has recently abandoned a contract. The replies (Exhibit 20, R. 80; Exhibit 23, R. 83) to these letters do not describe abandoned contracts.

Prior to this meeting Olson told Campos he was leaving (R. 249) and his letter of June 13, 1951 to the Commission (Exhibit 35, R. 244-248) stated Campos knew this. The only abandonment shown by these undisputed facts is Olson's unilateral abandonment. Olson's repudiation of the contracts was not an offer of rescission (5 Corbin on Contracts, Sec. 1236, p. 961).

B. The Argument That the Contracts Were Not Breached.

Campos' consent to Olson's leaving Hawaii was conditional. He "could go to the mainland provided that I had my contract rights" (R. 119).¹ Campos' statement was, of course, made after Olson had talked with Miles about going

1. See also Stagbar's testimony (R. 222-223) to the same effect.

back to Flaherty (R. 239), written Flaherty (R. 242), offered Campos \$6,000.00 for the contracts (R. 407-408), told Campos he was leaving for the mainland (R. 249), told Miles the same thing (R. 251), had been told by Flaherty that Flaherty had a good contract on him (R. 244) and written the Territorial Boxing Commission he was leaving (Exhibit 35, R. 244-248). To assert there was no breach of contract under these conditions because Campos consented to Olson's leaving simply disregards all the realities of the situation.

Appellees would have Campos require Olson to perform the contracts after June, 1951 and state there is no evidence Olson would not have performed. This naively ignores Olson's June 13, 1951 letter² to the Territorial Boxing Commission of Hawaii.

*"My territorial manager knew that I was scheduled to leave for the mainland to fulfill an engagement with my legal mainland manager, Sid Flaherty, immediately after the bout with Hunter on June 19th. * * * I hereby state of my own free will that I will not be available for further matches in the Territory until further notice by myself."* (Exhibit 35, R. 244-248, emphasis ours)

Olson's repudiation of the contracts excused Campos from further performance and such defense is not available to Olson (12 Cal. Jur. 2d 452-453, 462).

In *Alderson v. Houston* (1908), 154 Cal. 1, the defendant repudiated the contract with plaintiff. The Supreme Court

2. Inadvertently dated June 31, 1951 in Appellees' Reply Brief at page 23.

stated that defendant's breach discharged the plaintiffs from performance of any of the conditions on their part (*Id.* p. 10). The Court also pointed out plaintiff's remedy is to sue immediately for his prospective damage or, in the alternative, wait until the expiration of the time of performance and then sue for damage.

Other authorities for this proposition are *Taylor v. Sapritch* (1940), 38 C.A. 2d 478, 481 and *Bewich v. Meeham* (1945), 26 C.2d 92, 99.

C. The Argument That Anticipatory Breach Does Not Apply.

The evidence on anticipatory breach is so clear in this case that little further comment is necessary. The June 13, 1951 letter (Exhibit 35, R. 244-248) speaks for itself. Prior to that Olson told Campos he was quitting (R. 249). Olson then left and went to San Francisco (R. 404) and to Flaherty (R. 252). These acts constituted anticipatory repudiation (*Restatement of Contracts*, Sec. 318; *Gold Mining and Water Co. v. Swinerton* (1943), 23 C.2d 19, 29).

The cases on anticipatory repudiation are clear that the bringing of suit is sufficient election to treat the repudiation as a breach (*Crown Products Company v. California Foods Corp.* (1947), 77 C.A. 2d 543, 551). The case cited by appellees, *Robinson v. Raquet* (1934), 1 C.A. 2d 533 for the proposition that repudiation is not effective unless it is unequivocally accepted by the promisee, states the rule in full:

"Repudiation, or renunciation, as the term is more generally used, is but an act or declaration in advance of any actual breach, and consists usually of an absolute and unequivocal declaration or act amounting to a declaration on the part of a promisor to the promisee that he will not make performance on a future day at which the contract calls for performance. It is in the nature of an antici-

patory breach before performance is due, but *does not operate as an anticipatory breach unless the promisee elects to treat the repudiation as a breach and brings suit for damages* [citations]” (Id. pp. 542-543, emphasis ours). Campos treated Olson’s repudiation as a breach in bringing a suit for damages.

D. The Argument That There Was No Interference With Contractual Relations.

The tort is *interference* with a contract (Prosser on Torts, 977). It is defined in Section 766 of the Restatement of Torts and *Romano v. Wilbur Ellis & Co.* (1947), 82 C.A. 2d 670 which latter case stated if defendant “enters into a contract with a person, who is already under contract with the plaintiff, *with knowledge or surmise of the existence of the prior contract, and of the fact that performance to the defendant will prevent performance to the plaintiff,*” he should be liable for inducing breach of contract (Id. p. 673, emphasis ours). The evidence shows Flaherty had knowledge of the Olson-Campos contractual relationship in the middle of 1948 (R. 320-321); Flaherty’s close friend Miles was advising Olson (R. 251) and advancing money to him (R. 240); Flaherty told Olson about his good contract on Olson (R. 244); Flaherty arranged with Miles to pay Olson’s transportation to San Francisco (R. 319). It is true there is no admission by Flaherty of his activities interfering with these contracts, but such evidence would hardly be forthcoming. “Far fetched conjecture” is a cunning description of this evidence in this case which clearly confutes Flaherty’s innocence.

The statute of limitations is inapplicable. The Trial Court made no findings concerning the statute of limitations nor were any proposed by the defendants (see Findings of Fact

lodged by defendants, Record on Appeal). The Trial Court's findings of fact were based substantially upon those proposed by the defendants.

As a matter of law failure to find a fact essential to a recovery is equivalent to a finding against the party having the burden of proving the same. (*Container Patents Corporation v. Stant* (1944, 7 Cir.), 143 F.2d 170, 172). The burden of proof of establishing the defense of the statute of limitations rests upon the defendants (*Ware v. Heller* (1944), 63 C.A. 2d 817, 829).

Defendants' revived interest in the statute of limitations is an unwarranted attempt to mend its hold on the appeal after failing to exercise their rights in the District Court and should not be countenanced by this Court (*Kennedy v. United States* (1940, 9 Cir.), 115 F.2d 624, 625).

Independent of this situation the statute of limitations does not bar this action. Flaherty's interference prior to July 19, 1951 resulted in Olson's leaving Hawaii and reporting to Flaherty in San Francisco. The cause of action arose in Hawaii (Rest. of Conflicts, Sec. 377), the place where the incidental right of protection is injured (2 *Beale, Conflict of Laws* 1287. See also, *Goodrich on Conflict of Laws* 263, 264.) At the time of this wrong plaintiff Campos resided in Hawaii and defendant Flaherty resided in California (R. 49). The absence of Flaherty tolled the Hawaiian statute of limitations³ of which this Court may take judicial notice

3. *Sec. 10434*: "If at any time when any cause of action specified in part 1 of this chapter shall accrue against any person, he shall be out of the Territory, such action may be commenced within the terms herein respectively limited, after the return of such person into the Territory, and if, after such cause of action shall have accrued, such person shall depart from and reside out of the Territory, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action" (*Revised Laws of Hawaii*, 1945).

(*Breed v. Northern Pacific Railroad* (1888, Cir. Ct., D. Minn.), 35 Fed. 642, 643; 31 C.J.S. 524; 20 Am. Jur. 62). California's statute is to the same effect (*Code of Civil Procedure*, Sec. 351). Flaherty's absence from Hawaii during this time prevented personal service of an Hawaiian action upon him and for this reason (the one underlying the statute) tolled the statute (*Irving National Bank v. Law* (1926, 2 Cir.), 10 F.2d 721 reversing prior opinion in 9 F.2d 536).

Completing the answer to appellees' argument on this point—which statute of limitation applies? Appellees assert the two year statute does. But *Romano v. Wilbur Ellis & Co.* (1947), 82 C.A. 2d 670 squarely holds that the three year period of Section 338(4) of the *Code of Civil Procedure* controls on the theory that the gist of such action is constructive fraud.

“This is not an action for breach of contract between appellant and Pesquera. The latter is not a party to the action. The suit is for damages for fraud. *The accepted rule of the cases hereinabove cited is that the gist of this type of action is fraud.* Section 1573 of the Civil Code provides: ‘Constructive fraud consists:

‘1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him.’” (Id. p. 673, emphasis ours)

The important consideration, however, is that any cause of action for inducing breach of contract against Flaherty on the facts of this case arising within the applicable statutory period prior to the commencement of the present suit is obviously not barred. The five-year contract of July 14, 1948 did not expire by its terms until July 18, 1953 and the ten-year agreement of July 20, 1949 provided that it should

remain in effect until July 19, 1959. The actionable interference by Flaherty with these contracts has continued consistently from July 9, 1951 up to the present time.

In *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707 Justice Crompton found the tort to be a continuing one when he stated the rule as follows:

“* * * it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and *during the time stipulated for as the period of service*, whereby the master is injured, commits a wrongful act for which he is responsible at law.” (Id. 2 El. & Bl. 216 at 224, 118 Eng. Rep. 749 at 752-753, emphasis ours)

Injunction to restrain a continuing interference with contract rights is generally a proper remedy under the authorities and the mere fact that this is an action for damages does not change the complexion or character of the wrong. The rule is stated as follows at 54 C.J.S. 127 in Section 169 of “Limitations of Actions”:

“Subject to rules governing single or successive suits, it may be broadly stated that, where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious overt acts cease. In this connection it has been said that one should not be allowed to acquire a prescriptive right to continue a wrongful act.”

Cited in Corpus Juris in support of the foregoing text is the closely analogous case of *Cain v. Universal Pictures Co., Inc.*, (1942, Dist. Ct., S.D. Cal. Cent. Div., 47 F. Supp.

1013). There the suit was for infringement of copyright in appropriating literary material and including it in a motion picture. Taylor, the scenario writer who adopted the material from plaintiff's novel for the purposes of the picture, was joined as a defendant and he raised the two year statute of limitations, Section 339(1), upon the ground that more than two years had elapsed prior to the commencement of the action since the adaptation and release of the picture—his part in the original tort. However, the Court held that the action was not barred as to Taylor, saying:

“The material was intended by him to be used in the motion picture to be produced from the story, *which was to be exhibited to the public on its completion and release.*

“So the wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.

“Therefore, conceding that the actual distribution of the picture, following its original release, was done by others than Taylor, the action is not barred, as to him, by the expiration of two years from the date of release. *For the continuous exhibition of the picture is one of the aims of the composition of the script by him.* He is, therefore, chargeable not only with the act of composing the screen play, but is also a participant in its incorporation into the motion picture and its subsequent exhibition. For those were the contemplated purposes inherent in his contribution. Hence the conclusion that the action as to Taylor is not barred by the statute of limitations.” (Id., pp. 1017-1018, emphasis ours)

In other words, it was held in the cited case that a continuing interference with plaintiff's property rights by exhibiting the picture was not barred at the expiration of the statutory period running from the inception of the wrong. So in the present case Flaherty's continued interference with plaintiff's property rights under existing contracts is not barred until the statute runs after such interference ceases. Even with respect to the five-year contract of July 14, 1948 *standing alone*, though the invasion of plaintiff's rights may be cut off prior to June 10, 1953 if the two-year statute applies—the contract not expiring by its terms until July 18, 1953—nevertheless Flaherty remains liable in damages.

CONCLUSION

We submit that Appellees' view of the evidence and the law in this case is unsupportable. Olson's conduct prior to June 19, 1951 was a repudiation, actually and anticipatorily, of his contracts with Campos. At the June 19, 1951 meeting of the Territorial Boxing Commission there was no mutual rescission of these contracts, there was only Olson's unilateral repudiation. Flaherty's participation, from passive encouragement to active participation, in Olson's breach of these contracts is clearly set forth in the record of this case. For these reasons we submit the judgment of the District Court should be reversed.

Respectfully submitted,

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No. 15184

United States
Court of Appeals
for the Ninth Circuit

—
PELTA FURS,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.
—

Transcript of Record
—

On Petition for Review of an Order
to Cease and Desist

FILE

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United States of America,
Before Federal Trade Commission

Docket No. 6297

In the Matter of:

JACQUES DE GORTER and SUZE C. DE
GORTER, as Individuals and as Co-Partners
Trading as PELTA FURS

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Jacques De Gorter and Suze C. De Gorter, as individuals and as co-partners trading as Pelta Furs, hereinafter referred to as respondents, have violated the provisions of said acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph One: Respondents Jacques De Gorter and Suze C. De Gorter are individuals trading as Pelta Furs, with their office and principal place of business located at 437 West Seventh Street, Los Angeles, California.

Paragraph Two: Individual respondents Jacques De Gorter and Suze C. De Gorter have, for several

years last past, been engaged in the purchase, sale and distribution of fur products including fur coats, jackets, stoles and related fur garments. Respondents cause and have caused the aforesaid fur products, when sold, to be transported from their place of business in the State of California to purchasers thereof located in various places other than in the State of California. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products, in commerce, among and between the various States of the United States. [2*]

Paragraph Three: Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondents have introduced, sold, advertised, offered for sale, transported and distributed fur products in commerce, and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur product," are defined in the Fur Products Labeling Act. Certain of said fur products have been misbranded, falsely advertised and falsely invoiced in violation of the Fur Products Labeling Act and of the rules and regulations promulgated thereunder.

Paragraph Four: Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondents caused the dissemination in commerce, as

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“commerce” is defined in the Fur Products Labeling Act, of certain advertisements concerning said products by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5 (a) of the Fur Products Labeling Act and of the rules and regulations promulgated under said Act, and which advertisements were intended to and did aid, promote and assist, directly and indirectly, in the sale and offering for sale of said fur products.

Paragraph Five: Among and including the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in various issues of the “Los Angeles Examiner,” “Los Angeles Times,” and “Los Angeles Herald and Express”; publications having wide circulation in the State of California and in the adjacent areas of other States of the United States. Certain, but not all, of said advertisements are referred to and described in Paragraphs Seventeen through Twenty hereof and are incorporated herein by reference.

By means of the aforesaid advertisements and through respondents’ acts, practices and representations with respect to their use of price tags, as referred to in Paragraphs Seven and Eight hereof and incorporated herein by reference, and by other means not referred to specifically herein, respondents, directly or by implication, have falsely and deceptively:

a. Misrepresented prices of fur products as having been reduced from regular or usual prices,

where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of their business, in violation of Rule 44 (a) of the aforesaid rules and regulations. [3]

b. Misrepresented, by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of said fur products, in violation of Rule 44 (b) and (c) of the aforesaid rules and regulations;

c. Misrepresented the grade, quality or value of certain of said fur products by the use of illustrations depicting higher priced or more valuable products than those actually available for sale at the advertised selling price, in violation of Rule 44 (f) of the aforesaid rules and regulations.

d. Misrepresented, in violation of Rule 44 (g) of the said rules and regulations, fur products as being:

1. From the stock of a business in the state of liquidation; and

2. From the stock of a business consolidated with that of a famous mink manufacturer.

Respondents, in making the pricing claims and representations referred to in subparagraphs (a) and (b) hereof, and by the acts, statements and representation referred to in Paragraphs Seven and Eight hereof that have been incorporated herein by reference, failed to maintain full and adequate records disclosing the facts upon which

such claims and representations were purportedly based, in violation of Rule 44 (e) of the said rules and regulations.

Paragraph Six: Certain of said fur products were falsely and deceptively advertised in that certain of the advertisements disseminated in commerce as aforesaid by respondents, including, but not necessarily limited to those referred to or incorporated by reference in Paragraphs Four and Five hereof, failed to set forth the information required by Section 5 (a) of the Fur Products Labeling Act, and in the manner and form prescribed by the rules and regulations promulgated thereunder.

Certain of said advertisements failed to disclose:

a. The name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations; [4]

b. That fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact;

c. The name of the country of origin of imported furs contained in such fur products.

Paragraph Seven: Certain of said fur products were falsely or deceptively advertised by respondents by means of representations on price tags affixed to fur products, and by oral representations made by respondents or their sales people and by other means, which advertisements contained forms

of misrepresentation or deception, directly or by implication, with respect to such fur products, in violation of Section 5 (a) of the Fur Products Labeling Act, and the rules and regulations promulgated thereunder.

Paragraph Eight: The price tags referred to in Paragraph Seven hereof contained fictitious prices and misrepresented the value of such products, in that the purported selling price and representation as to value contained thereon, in numerals and symbols clearly distinguishable by members of the purchasing public, quoted a price at which respondents did not generally expect to sell such product, nor at which such product was being generally sold by respondents in the recent regular course of their business.

On the contrary, the said quoted prices were primarily for bargaining purposes; the actual price at which respondents generally expected to and did sell such products, during the recent regular course of their business, was a lower price, as set forth in a series of coded prices on said price tags. One of said coded prices, the higher, represented a price at which respondents, and certain of their sales people who were especially so authorized by respondents, sold or offered to sell such fur products to members of the purchasing public during the course of such bargaining.

The final coded price on said price tags represented the lowest price at which said fur product would generally be sold by respondents to members

of the purchasing public; said final price not being quoted to the prospective purchaser until and after all efforts to effectuate a sale at the higher coded price had been exhausted. The selling prices thus represented in code were not understandable as a price marked on said price tags to a substantial portion of the purchasing public, but could easily be understood by respondents and such of their sales people as were informed of the coding system used. [5]

The use of the aforesaid fictitious prices and misrepresentations as to value on price tags, coupled with oral representations of respondents and their sales people and with the use of advertising containing misrepresentations as set forth in Paragraphs Five and Seventeen through Twenty hereof and incorporated herein by reference, were intended to and did aid, promote and assist, directly or indirectly, in the sale or offering for sale of such fur products.

Paragraph Nine: Certain of said fur products were misbranded in violation of Section 4 (1) of the Fur Products Labeling Act, in that the name or names of the animal or animals producing the fur contained in such fur products were falsely and deceptively identified as "mink" on the reverse side of the label attached thereto, which labels, on the obverse side thereof, bore the proper identification of such fur product.

Paragraph Ten: Certain of said fur products were misbranded in that they did not have affixed

thereto labels showing the information required under the provisions of Section 4 (2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder.

Paragraph Eleven: Certain of said fur products were misbranded in that respondents, on labels attached thereto, set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 4 (3) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Paragraph Twelve: Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the rules and regulations promulgated thereunder in the following respects:

a. Required information was mingled with non-required information on labels, in violation of Rule 29 (a) of the said rules and regulations;

b. Required information was not completely set forth on one side of the labels, as required by Rule 29 (a) of the aforesaid rules and regulations;

c. Required information was set forth in handwriting on labels, in violation of Rule 29 (b) of the aforesaid rules and regulations; [6]

d. Required information was set forth in improper sequence on labels, in violation of Rule 30 of the aforesaid rules and regulations.

Paragraph Thirteen: Certain of said fur products were falsely and deceptively invoiced, in that

they were not invoiced as required under the provisions of Section 5 (b) (1) of the Fur Products Labeling Act, and in the manner and form prescribed by the rules and regulations promulgated thereunder.

Paragraph Fourteen: Certain of said fur products were falsely and deceptively invoiced in that respondents, on invoices furnished to purchasers of said fur products, set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 5 (b) (2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Paragraph Fifteen: Certain of said fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling Act, in that they were not invoiced in accordance with the rules and regulations promulgated thereunder in the following respects:

a. Required information was set forth in abbreviated form in violation of Rule 4 of the aforesaid rules and regulations;

b. Respondents failed to set forth an item number or mark assigned to fur products in violation of Rule 40 (a) of the aforesaid rules and regulations.

Paragraph Sixteen: The aforesaid acts and practices of respondents, as set forth or incorporated by reference in Paragraphs Three through Fifteen hereof, were in violation of the Fur Products Label-

ing Act and of the rules and regulations promulgated thereunder and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Paragraph Seventeen: In the course and conduct of their business, respondents caused the dissemination of certain advertisements relating to their aforesaid fur products. Among said advertisements were those published in various newspapers containing certain statements and representations, and those acts, practices, statements and representations referred to in Paragraphs Four through Eight hereof and incorporated herein by reference. Among and including said advertisements, but not limited thereto, were the following: [7]

In the "Los Angeles Examiner," issue of September 20, 1953, the following advertisement of respondents appeared:

"After Thirty-eight Years — Los Angeles' Largest Exclusive Furrier—Pelta Furs Quits. Going Out of Business Sale! . . . Entire Stock Must Go. . . . Slashed Prices. . . ."

In the "Los Angeles Examiner" issue of October 11, 1953:

"Pelta Furs . . . Quits! \$250,000.00 Inventory Sacrificed. Entire Fur Stock Must Go: At a Fraction of Original Prices! Savings Are Tremendous. . . ."

In the "Los Angeles Examiner" issue of November 22, 1953, substantially the same language appeared

as quoted immediately above, with the added statement:

“All Advance 1954 Holiday Gift Furs Now at Cost and Below Cost. . . .”

In the “Los Angeles Examiner” issue of January 17, 1954:

“Out They Go—for Whatever We Can Get! Final Days of Pelta Furs Going Out of Business Sale. A Group to Be Liquidated at Cost or Below Cost. . . . Notice — Arrangements Have Been Made to Adequately Take Care of Complete Guarantee and Promised Free Fur Service. . . .”

“(Fur Items)	Were	Now
”	\$ 595	\$166
”	675	188
”	750	244
”	795	299
”	1095	333
”	1175	398
”	1250	444”

* * *

In the “Los Angeles Times” issue of September 26, 1954:

“Manufacturers’ Financial Sacrifice!

“Many at Cost! Many Below Cost!

“Many Regardless of Cost! . . .”

In the “Los Angeles Times” issue of October 17, 1954:

“Discount Sale! Tremendous Inventory of Selected Furs. Priced Regardless of [8] Cost! . . .”

“(Fur Items)	Value Up to	Now
”	.....\$ 250	\$ 88
”	..... 350	128
”	..... 450	188
”	..... 595	288
”	..... 750	388
”	..... 975	488
”	..... 3500	1488”

* * *

Paragraph Eighteen: By means of the statements contained in the advertisements set forth or incorporated by reference in Paragraph Seventeen hereof, and others of the same import and meaning not specifically set forth herein, respondents represented that the firm of Pelta Furs, and the owners thereof, respondents herein, were going out of the fur business; were discontinuing operations, and disposing of or liquidating their entire stock of fur products at “distress” prices, and that members of the public could purchase such products at, or for less than, the amount respondents had paid for them. In truth and in fact, Pelta Furs and its owners, respondents herein, did not go and are not now out of the fur business; did not discontinue operations and did not dispose of or liquidate their entire stock at “distress” prices or otherwise. The aforesaid representations as to reduced prices and as to savings to be effectuated thereby, and their

acts, practices, statements and representations, as set forth in Paragraphs Four through Eight hereof and incorporated herein by reference, were false, misleading and deceptive.

Paragraph Nineteen: In the course and conduct of their business, respondents further disseminated advertisements relating to their fur products. Among said advertisements, but not limited thereto, and including those acts, practices, statements and representations referred to in Paragraphs Four through Eight hereof and incorporated herein by reference, was that contained in the "Los Angeles Times" issue of May 24, 1953, which contained, among others, the following statement:

"Now! Pelta Furs Consolidates With Famous Wholesale Mink Manufacturer. More Space Needed! Complete Stock of \$250,000.00 Exquisite Styles Now on Sale at One-Half Price. Present Unchanged Price Tags Now on Garments. You May Deduct 1/2. . . ." [9]

Paragraph Twenty: By means of the statements referred to or incorporated by reference in Paragraph Nineteen hereof, and others of the same import and meaning not specifically set forth herein, respondents represented directly or by implication that the prices marked on their price tags were the usual prices charged by respondents for such products in the recent regular course of their business. In truth and in fact, said price tags contained fictitious prices; as referred to and described in Paragraphs Seven and Eight hereof and incor-

porated herein by reference and the aforesaid advertised reductions in price, such as of one-half off, and the acts, practices, statements and representations referred to in Paragraphs Seven and Eight hereof which have been incorporated herein as aforesaid, were not based upon reductions of such amounts from the usual prices charged by respondents for such products in the recent regular course of their business, and were false, misleading and deceptive.

Paragraph Twenty-one: Respondents, in the course of their business, have been, and are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, and are in substantial competition in commerce with other firms, corporations, co-partnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

Paragraph Twenty-two: The use by the respondents of the aforesaid false and misleading statements and representations as alleged or incorporated by reference in Paragraphs Seventeen through Twenty-one hereof has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are in fact true and into the purchase of substantial quantities of respondents' fur products by reason of such erroneous and mistaken belief.

As a result thereof substantial trade in commerce

has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

Paragraph Twenty-three: The aforesaid acts and practices of respondents, as alleged or incorporated by reference in Paragraphs Seventeen through Twenty-two hereof, are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission on this 25th day of February, A.D. 1955, issues its complaint against said [10] respondents.

Notice

Notice is hereby given you, Jacques De Gorter and Suze C. De Gorter, as individuals and as co-partners trading as Pelta Furs, respondents herein, that the 9th day of May, A.D. 1955, at 10 o'clock is hereby fixed as the time and Los Angeles, California, as the place when and where a hearing will be had before J. Earl Cox, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded

you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint unless you are without knowledge, in which case you shall so state. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

If respondents desire to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondents admit all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondents may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXIII.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission and Hearing Examiner J. Earl Cox, without further notice, to find the facts to be as alleged herein and to issue the following order in this proceeding: [11]

It Is Ordered that respondents Jacques De Gorter and Suze C. De Gorter, individually and as co-partners trading as Pelta Furs or under any other trade name, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, or the sale, advertising or offering for sale, or the transportation or distribution of any fur product in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured;

2. Failing to affix labels to fur products showing:

a. The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

b. That the fur product contains or is composed of used fur when such is a fact;

c. That the fur product contains or is composed

of bleached, dyed, or artificially colored fur when such is a fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur when such is a fact;

e. The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; [12]

f. The name of the country of origin of any imported furs used in the fur product.

3. Setting forth, on labels attached to fur products, the name or names of any animal or animals other than the name or names provided for in Paragraph A (2) (a) above.

4. Setting forth on labels attached to fur products:

a. Non-required information mingled with required information;

b. Required information in handwriting;

c. Required information in a sequence different from that required by Rule 30 (a) of the rules and regulations.

5. Failing to show, on labels attached to fur products, all of the required information on one side of such labels.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

a. The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

b. That the fur product contains or is composed of used fur when such is a fact;

c. That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is a fact;

e. The name and address of the person issuing such invoices; [13]

f. The name of the country of origin of any imported furs contained in the fur product.

2. Using on invoices the name or names of any animal or animals other than the name or names provided for in Paragraph B (1) (a) above, or setting forth thereon any form of misrepresentation or deception, directly or by implication, with respect to such fur products.

3. Setting forth required information in abbreviated form.

4. Failing to show the item number or mark of

fur products on the invoices pertaining to such products, as required by Rule 40 of the rules and regulations.

C. Falsely or deceptively advertising fur products, through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose:

a. The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

b. That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur when such is a fact;

c. The name of the country of origin of imported furs contained in fur products.

2. Represents directly or by implication:

a. That the regular or usual price of any fur product is any amount which is in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business; [14]

b. That a sale price enables purchasers of fur products to effectuate any savings in excess of the difference between the said price and the price at which comparable products were sold during the time specified or, if no time is specified, in excess

of the difference between said price and the current price at which comparable products are sold;

c. That an amount set forth on price tags, or otherwise relating or referring to fur products, represents the value or the usual price at which said fur products had been customarily sold by respondents in the recent regular course of their business, contrary to fact;

d. That any such product is of a higher grade, quality, or value than is the fact, by means of illustrations or depictions of higher priced or more valuable products than those actually available for sale at the advertised selling price, or by any other means.

e. That any of such products are:

1. From the stock of a business in a state of liquidation, contrary to fact;

2. From the stock of a business recently consolidated with another, contrary to fact.

3. Makes pricing claims or representations of the type referred to in Paragraph C (2) (a), (b), and (c) above, unless there is maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

It Is Further Ordered that respondents Jacques De Gorter and Suze C. De Gorter, individually and as co-partners trading as Pelta Furs or under any other trade name, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offer-

ing for sale, sale, and distribution of fur products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do further [15] cease and desist from making, directly or by implication, any of the representations prohibited by Paragraph C (2) of this order.

The inclusion of such order to cease and desist in this complaint will be without effect in the event you show cause, on or before the 9th day of May, A.D. 1955, why such order should not issue.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 25th day of February, 1955.

By the Commission.

/s/ ROBERT M. PARRISH,
Secretary. [16]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER

Come now the respondents, Jacques De Gorter and Suze C. De Gorter, and answer the complaint of the United States of America before the Federal Trade Commission, as follows:

I.

Answering paragraph One, respondents deny that they are trading as Pelta Furs, and in that regard allege that ever since January, 1954, respondent, Jacques De Gorter has been trading as Pelta Furs at 437 West Seventh Street, Los Angeles, California.

II.

Answering paragraph Two deny that respondents do now cause, or have for several years last past caused fur products, when sold, to be transported from their place of business in the State of California, to purchasers thereof located in various other places than in the State of California. Respondents deny that they maintain now, and deny that at all times mentioned in the complaint they have maintained, a course of trade in said fur products in commerce, among and between the various states of the United States.

Further answering said paragraph, respondent Jacques De Gorter alleges that all sales of fur products referred to in the complaint have been sold by him to purchasers located in the County of Los Angeles, State of California, but that on infrequent occasions, at the request of the purchaser and as a courtesy to the purchaser, the fur product so sold has been wrapped and deposited by his employees in the mails, or with a common carrier, to be transported to an address outside of the State of California. [18]

III.

Answering paragraph Three respondents deny that they have introduced, or sold, or advertised, or offered for sale, or distributed fur products in commerce and deny that they have sold, or advertised, or offered for sale, or distributed, or transported fur products which have been made in whole or in part of fur, which had been shipped and received in commerce, as defined in the Fur Products Labeling Act.

Further answering said paragraph, respondents deny that if those fur products sold by them were introduced in commerce, as defined in said Act, that said fur products were misbranded, or falsely advertised, or falsely invoiced in violation of said Act or the rules or regulations promulgated thereunder.

IV.

Answering paragraph Four deny that any fur products caused to be disseminated, which may have been disseminated or caused to be disseminated in commerce, as commerce is defined in said Act, were falsely or deceptively advertised, in accordance with the provisions of Section 5 (a) of said Act and of the rules and regulations promulgated thereunder.

V.

Answering paragraph Five deny that the advertisements which appeared in various issues of the Los Angeles Examiner, Los Angeles Times and Los Angeles Herald and Express were violative of Sec-

tion 5 (a) of said Act or the rules and regulations promulgated thereunder.

Further answering said paragraph deny that the so-called regular or usual prices referred to in subdivision (a) were in fact fictitious prices as the word "fictitious" is used in said Act, and particularly in Rule 44 (a) thereof.

Further answering said paragraph deny that comparative prices and other statements referred to in subdivision (b) of said paragraph were not based on current market values as said "current market values" is used in Rule 44 (b) and (c) of said rules and regulations.

Further answering said paragraph deny that the respondents misrepresented the grade, or quality, or value of certain of said fur products by the use of illustrations depicting higher priced or more valuable products than those available for sale at the advertised [19] selling price as alleged in subdivision (c) of said paragraph, and in that regard alleges that any illustrations of furs or fur products appearing in those advertisements were not illustrations of any particular furs or fur products, but were merely illustrative of a type of wearing apparel distinguished from cloth, wool, or other materials of which wearing apparel is made.

Further answering said paragraph deny that respondents misrepresented fur products as being from the stock of a business in a state of liquidation, and respondents allege that any such representations were in fact true.

Further answering said paragraph deny that they

failed to maintain full and adequate records disclosing the facts upon which such claims or representations, referred to in said paragraph, or in paragraphs Seven and Eight of the complaint which by incorporation are included in said paragraph, were made.

VI.

Answering paragraph Six deny that any of the advertisements of fur products sold by respondents were disseminated in commerce; and further answering said paragraph deny that certain of said fur products advertised by respondents failed to set forth the information required by Section 5 (a) of said Act either in the manner or in the form prescribed by the rules and regulations promulgated thereunder.

Further answering said paragraph deny that respondents failed to disclose the name or names of the animal or animals producing the fur or furs contained in the fur products advertised by respondents, or that said fur products contained or were composed of bleached or dyed or otherwise artificially colored fur, when such was the fact, or the name or country of origin of imported furs containing such fur products, where such fur products were imported from other countries.

VII.

Answering paragraph Seven deny that certain of said fur products were falsely or deceptively advertised by means of representations or price tags affixed to such fur products; or by oral represen-

tations made by respondents or their sales force or by other means in violation of Section 5 (a) of said Act and the rules and regulations promulgated thereunder. [20]

VIII.

Answering paragraph Eight deny that the price tags referred to in Paragraph Seven of the complaint, contained fictitious prices or misrepresented the value of such products.

Further answering said paragraph, respondents allege that the price tags exhibited thereon the selling price of the fur or fur product to which said price tag was attached, which selling price was arrived at by respondents in accordance with respondents' mark-up policy, which mark-up policy was based upon the quality of the fur or fur product, the extent of the demand therefor by the buying public, respondents' overhead and other such factors normally taken into consideration in establishing a selling price of any retail commodity.

Further answering said paragraph respondents allege that the definition of the word "fictitious" as contained in said paragraph, is not the generally accepted definition of the word "fictitious" either under general usage or as used by the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

IX.

Answering paragraph Nine deny that any of said fur products were misbranded in violation of Sec-

tion 4 (1) of said Act in that the label attached to said fur products identified said products as being the name of or produced by any animal other than the proper animal for the identification of said fur or fur product as provided by said Act and the rules and regulations promulgated thereunder.

X.

Answering paragraph Ten deny that certain of said fur products were misbranded in that they did not have affixed thereto labels showing information required under the provisions of Section 4 (2) of said Act.

Further answering said paragraph respondents allege that respondents have had as many as five hundred furs or fur products in their place of business at one time, all of which were labelled when placed in stock by respondents; that in a few isolated instances labels became detached from the fur products to which they had been affixed and may have been so detached for a short period of time until it was discovered by respondents or their employees that said fur or fur products were not [21] properly labelled and that proper labels were thereafter affixed to said fur or fur products.

XI.

Answering paragraph Eleven deny that certain of said fur products were misbranded, and in that regard respondents allege that the labels attached the animal that produced the fur, as provided in to each fur product correctly set forth the name of

the Fur Products Name Guide contained in the appendix to the rules and regulations of the Fur Products Labeling Act.

XII.

Answering paragraph Twelve deny that certain of said fur products were misbranded in violation of said Act in accordance with the rules and regulations promulgated thereunder, and respondents deny more particularly that required information was mingled with non-required information on labels; that required information was not completely set forth on one side of the labels; that required information was set forth in handwriting on labels, and that required information was not set forth in proper sequence on labels.

XIII.

Answering paragraph Thirteen deny that certain fur products were falsely or deceptively invoiced and in that regard allege that all of said fur products were invoiced as required under the provisions of Section 5 (b) (1) of said Act and of the rules and regulations promulgated thereunder.

XIV.

Answering paragraph Fourteen deny that respondents furnished to purchasers of fur products invoices on which was set forth the name of an animal other than the name of the animal that produced the fur which was sold to said purchaser.

XV.

Answering paragraph Fifteen deny that certain of said fur products were invoiced in abbreviated form or without any item number or mark assigned thereto as required by said Act and the rules and regulations promulgated thereunder.

XVI.

Answering paragraph Sixteen deny that any of the acts [22] or practices of respondents as set forth or incorporated by reference in paragraphs Three through Fifteen of the complaint constitute unfair or deceptive acts or practices in commerce under the Federal Trade Commission Act.

Further answering said paragraph, respondents allege that any acts or omissions to act committed by respondents or their employees as charged in said paragraphs Three through Fifteen, were so few in number as to be inconsequential in the operation of respondents' business, so as not to constitute either unfair or deceptive practices in commerce under the Federal Trade Commission Act as is sought to be prohibited in said Act and in the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

XVII.

Answering paragraphs Seventeen and Eighteen deny that the advertisement respondents were going out of business was untrue, and in that regard allege that Pelta Furs, a co-partnership composed of Jacques De Gorter and Suze C. De Gorter did, in

fact, go out of business as such partnership on or about January 1, 1954.

Further answering said paragraph deny that the advertisements referred to in said paragraphs, wherein said advertisements indicate sales of furs or fur products at cost or below cost, of at tremendous savings, were false or deceptive, and that respondents did at or about said time sell furs or fur products at or below cost to respondents.

Further answering said paragraphs respondents allege that wherein said advertisements advertised certain fur products or furs as being sold at a price less than the previous price or value, they were in fact true in that said fur products or furs were priced by respondents at the price indicated pursuant to respondents' policy of mark-up and pricing at the time said fur and fur products were placed in stock by respondents.

Further answering said paragraphs, allege that Pelta Furs has, since January, 1954, been operated by respondent Jacques De Gorter as a sole proprietorship and that upon the dissolution of the then existing partnership, as in this answer referred to, respondent Jacques De Gorter purchased the remaining stock of the partnership; that it was not the intention of respondent, Jacques De Gorter, to continue to operate Pelta Furs either as a partnership [23] or as an individually owned business, except for the fact that said respondent had personally guaranteed payment of the rent on a long term lease of the premises occupied by Pelta Furs, and that the lessors of said premises refused to cancel

said lease although prior to said closing out sale by the partnership, said lessors had indicated a contrary intention.

Further answering said paragraphs admit that said partnership had not, at the termination of its closeout sale, disposed of its entire stock for the reason that the buying public did not during that period of the closeout sale, purchase all of the stock offered at distress prices.

XVIII.

Answering paragraphs Nineteen and Twenty, deny that the advertising referred to therein was false or deceptive under the Fur Products Labeling Act or the rules and regulations promulgated thereunder.

Further answering said paragraphs, specifically deny that said price tags contained "fictitious" prices under the commonly accepted definition of said word, or as used in the Fur Products Labeling Act, and allege that the prices on the price tags referred to in said advertisements were prices arrived at by respondents in accordance with their policy in setting a price upon any fur or fur product offered by them for sale based upon cost, quality, public demand for the particular product, overhead, and all of the other considerations which determine the selling price of any commodity at retail.

Further answering said paragraphs allege that the definition of the word "fictitious" and the construction placed thereon in this complaint, is not a

proper definition or construction of said word either as defined in ordinary usage or as established by the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

XIX.

Answering paragraph Twenty-One, respondent Jacques De Gorter, denies that in the course of his business he is in substantial competition in commerce with other firms, corporations, co-partnerships or individuals, as contemplated by the Federal Trade Commission Act and the rules and regulations promulgated by it under the Fur Products Labeling Act. [24]

XX.

Answering paragraph Twenty-Two denies that the statements and representations alleged in paragraphs Seventeen through Twenty-One of this complaint, are false or misleading.

Further answering said paragraph denies that the purchasing public has been either misled or deceived with respect to furs or fur products purchased by said public from respondent by reason of any statements or representations as alleged or incorporated in said paragraphs Seventeen through Twenty-One.

Further answering said paragraph respondent denies that a substantial trade in commerce, as said term "commerce" is used in the Federal Trade Commission Act, or that any trade has been unfairly diverted to respondents from respondents' competitors, and further denies that substantial in-

jury has been done or is being done to competitors in commerce by reason of any acts of omission or commission committed by respondents in the operation of Pelta Furs.

XXI.

Answering paragraph Twenty-Three, deny that any of the acts or practices of respondents have constituted or do constitute unfair or deceptive acts or practices or unfair methods of competition in commerce within the intent or meaning of the Federal Trade Commission Act and respondent further denies that the acts or practices of respondent referred to in said paragraph were false or misleading or otherwise untrue.

XXII.

And for a further defense to the complaint, respondents allege that in the operation of Pelta Furs, either as a co-partnership or as an individually owned business, by respondent on and after January, 1954, respondents had not and are not now operating said business "in commerce" within the intent and meaning of the Federal Trade Commission Act, the Fur Products Labeling Act, or any of the rules and regulations promulgated thereunder and that the Federal Trade Commission has no jurisdiction over the conduct and operation of said business as heretofore or now operated.

As a further answer to said complaint, respondents allege that any acts or omissions to act committed by respondents or their employees, alleged in this complaint [25] to have been committed by

respondents were so few in number and of such small consequence as not to have resulted in substantial trade having been unfairly diverted, to respondents from their competitors, or to have resulted in substantial injury having been done to competition in commerce as to lead the Commission to believe that a proceeding by it in respect thereof would be to the interest of the public as provided in Section 5 (b) of the Federal Trade Commission Act.

Wherefore, respondents pray that this complaint be dismissed.

/s/ JACQUES DE GORTER,

/s/ SUZE C. DE GORTER.

Received March 28, 1955. [26]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

NOTICE OF INTENTION TO APPEAL

To the Federal Trade Commission:

You Will Please Take Notice that the Respondents in the above-entitled matter, Jacques De Gorter and Suze C. De Gorter, intend to appeal from the Initial Decision made by the Honorable Abner E. Lipscomb, Hearing Officer, in the above-entitled matter on November 18, 1955.

The appeal will be taken upon all available grounds which will be set forth in the brief on appeal.

Dated: December 9, 1955.

WALLEY & DAVIS,

By /s/ J. J. WALLEY,

Attorneys for Respondents.

Received December 12, 1955. [82]

United States of America,
Before Federal Trade Commission

Commissioners:

John W. Gwynne,

Chairman,

Lowell B. Mason,

Robert T. Secrest

Sigurd Anderson,

William C. Kern.

Docket No. 6297

In the Matter of:

JACQUES DE GORTER and SUZE C. DE
GORTER, as Individuals and as Co-Partners
Trading as PELTA FURS

FINDINGS AS TO THE FACTS,
CONCLUSIONS AND ORDER

The Commission, having fully considered the entire record herein, including the initial decision

of the hearing examiner and the cross-appeals therefrom, and having rendered its decision granting the appeal of counsel in support of the complaint and denying the appeal of respondents, and having vacated and set aside the initial decision, finds that this proceeding is in the interest of the public and makes this, its findings as to the facts, conclusions drawn therefrom, and order, the same to be in lieu of said initial decision.

Findings as to the Facts

1. Respondents, Jacques De Gorter and Suze C. De Gorter, are individuals trading as Pelta Furs, with their office and principal place of business located at 437 West Seventh Street, Los Angeles, California.

2. Respondents, Jacques De Gorter and Suze C. De Gorter, individually and trading as Pelta Furs, for several years last past have been engaged in [140] the purchase and distribution of fur products, including fur coats, jackets, stoles and related fur garments.

3. Respondents stipulated that in the course of their business, they are in substantial competition in commerce with other firms, corporations, co-partnerships and individuals also engaged in the sale of fur products to members of the purchasing public, and it is established by uncontroverted evidence that respondents obtained approximately 25% of their fur products by means of purchases made outside the State of California, and that such fur prod-

ucts were shipped to them at their place of business in California. The evidence also shows that these fur products were thereafter advertised in newspapers having an interstate circulation. The evidence further shows that in the months of September, October and November, 1953, respondents sold and shipped one fur product each month to purchasers outside the State of California, and that in the month of December of the same year, respondents so sold and shipped four fur products. Although these seven sales in commerce represent only a small proportion of all respondents' sales during that period of time, they are not mere isolated instances, but constitute a course of trade in commerce among and between the various states of the United States, as "commerce" is defined in the Federal Trade Commission Act. It is further found that the activities of the respondents in procuring fur products from sources outside the State of California, and thereafter advertising and offering for sale in newspapers of interstate circulation, and then selling and shipping and delivering such fur products in commerce clearly bring their business activities within the concept of "commerce" under the Fur Products Labeling Act.

4. As established by stipulation, and by other record evidence, respondents, in the course and conduct of their business, caused to be disseminated, in various newspapers having interstate circulation, advertisements containing certain statements and representations, among and including but not limited to the following: [141]

In the "Los Angeles Examiner," issue of September 20, 1953:

"After Thirty-Eight Years—Los Angeles' Largest Exclusive Furrier—Pelta Furs Quits. Going Out of Business Sale! . . . Entire Stock Must Go . . . Slashed Prices . . ."

In the "Los Angeles Examiner," issue of October 11, 1953.

"Pelta Furs . . . Quits! \$250,000.00 Inventory Sacrificed, Entire Fur Stock Must Go: At a Fraction of Original Prices! Savings are Tremendous . . ."

In the "Los Angeles Examiner," issue of November 22, 1953, substantially the same language appeared as quoted immediately above, with the added statement:

"All Advance 1954 Holiday Gift Furs Now At Cost and Below Cost . . ."

In the "Los Angeles Examiner," issue of January 17, 1954:

"Out They Go—For Whatever We Can Get! Final Days of Pelta Furs Going Out of Business Sale. A Group to be Liquidated at Cost or Below Cost . . . Notice—Arrangements Have Been Made to Adequately Take Care of Complete Guarantee and Promised Free Fur Service . . ."

“(Fur Items)	Were	Now
”	\$ 595	\$166
”	675	188
”	750	244
”	795	299
”	1095	333
”	1175	398
”	1250	444”
* * * [142]		

In the “Los Angeles Times,” issue of September 26, 1954:

“Manufacturers’ Financial Sacrifice! Many at Cost! Many Below Cost! Many Marked Regardless of Cost! . . . ”

In the “Los Angeles Times,” issue of October 17, 1954:

“Discount Sale! Tremendous Inventory of Selected Furs. Priced Regardless of Cost! . . .

“(Fur Items)	Value Up To	Now
”	\$ 250	\$ 88
”	350	128
”	450	188
”	595	288
”	750	388
”	975	488
”	3500	1488”
* * *		

As established by Commission’s Exhibit No. 14, respondents, on May 17, 1953, published in the Los Angeles Examiner an advertisement, as follows:

“Pelta Furs consolidates with famous wholesale mink manufacturer. More Room Required! Complete Stock \$250,000.00 Exquisite Styles Now on Sale 1½ price. Present unchanged price tags remain on garment. You May Deduct One-Half!!!”

5. Advertisements disseminated in commerce, by respondents, typical examples of which are quoted above and which advertisements were intended to and did aid, promote and assist, directly and indirectly, in the sale and offering for sale by respondents of fur products, are shown by stipulation or otherwise to have been false and deceptive through failure to set forth information required by Section 5 (a) of the Fur Products Labeling Act, by omitting to state:

a. The name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations; [143]

b. That fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact;

c. The name of the country of origin of imported fur contained in such fur products.

6. Besides it having been so stipulated by respondents, the record shows and it is found that certain of respondents' fur products were misbranded as follows:

a. The name or names of the animals producing

the fur contained in such fur products were in violation of Section 4 (1) of the Fur Products Labeling Act, falsely and deceptively identified as "mink" on the reverse side of the label attached thereto, on the obverse side of which appeared the proper identification of such fur product;

b. They did not have affixed thereto labels showing the information required under the provisions of Section 4 (2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder;

c. Labels attached to fur products set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 4 (3) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder;

d. Required information was mingled with non-required information on labels, in violation of Rule 29 (a) of the said rules and regulations;

e. Required information was not completely set forth on one side of the labels, as required by Rule 29 (a) of the aforesaid rules and regulations. [144]

f. Required information was set forth in handwriting on labels, in violation of Rule 29 (b) of the aforesaid rules and regulations;

g. Required information was set forth in improper sequence on labels, in violation of Rule 30 of the aforesaid rules and regulations.

7. As established by stipulation and other evidence of record, certain of respondents' products were falsely and deceptively invoiced, as follows:

a. Certain of respondents' fur products were falsely and deceptively invoiced, in that they were not invoiced as required under the provisions of Section 5 (b) (1) of the Fur Products Labeling Act, and in the manner and form prescribed by the rules and regulations promulgated thereunder;

b. Certain of respondents' fur products were falsely and deceptively invoiced in that respondents, on invoices furnished to purchasers of said fur products, set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 5 (b) (2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder;

c. In violation of the Fur Products Labeling Act, they were not invoiced in accordance with the rules and regulations promulgated thereunder, in the following respects:

(1) Required information was set forth in abbreviated form in violation of Rule 4 of the aforesaid rules and regulations;

(2) Respondents failed to set forth an item number or mark assigned to fur products in violation of Rule 40 (a) of the aforesaid rules and [145] regulations.

8. Advertisements, typical examples of which are heretofore quoted, which show discount sales and comparative and fictitious prices, must be considered in connection with respondents' method of determining the prices at which their fur products shall be sold, and of setting forth such prices on the price

tags attached to each fur product. The evidence shows that when a shipment of fur products is received by respondents, price tags are prepared bearing three prices, the largest of which is set forth in plain figures and may be read by anyone. The other two prices are written in code, and may only be read by the respondents or members of their sales staff who know the code. The plainly shown maximum price is referred to by the respondents as the "regular price," and represents respondents' maximum asking price. When a sale is advertised, the plainly marked price is shown as the regular price or value of the item featured, and the higher of the two coded prices is shown as the sale price. The lower of the two coded prices represents the price below which respondents cannot sell the product and still make a profit. These price tags are not altered or removed from the garments when they are placed on sale, and the only price that can be read by the customers is the first or maximum price. These maximum prices are realized by respondents during the off-season in only 10% of their sales, and in the fur-selling season in less than 50% of their sales.

Respondent Jacques De Gorter testified that he never identified a particular garment in advertisements, and that therefore he sold any of his fur garments at any of the three prices marked on the tag, preferably the maximum if he could get it. He further testified that if a customer offered him one of the coded prices and he concluded that he could not sell the garment at the higher price, then he would sell it for the price offered.

The conclusion is warranted, and it is therefore found that:

a. When respondents advertise a sale and list the plainly ticketed price as the regular price of the item on sale, they are using a fictitious price in the sense that it is not the price at which the garment has been customarily and usually sold by the [146] respondents in the recent course of their business in violation of Rule 44 (a) of the aforesaid rules and regulations.

b. The respondents, by the use of comparative prices as shown in the above-quoted advertisements, misrepresented the savings to be effected by purchasers of respondents' fur products in violation of Rule 44 (b) and (c) of the aforesaid rules and regulations.

It is established by stipulation and other evidence of record that:

a. Respondents have misrepresented the grade, quality or value of certain of their fur products by advertising such fur products by the use of illustrations which showed such fur or fur products to be higher priced products than the ones so advertised in violation of Rule 44 (f) of the aforesaid rules and regulations.

b. Respondents, in violation of Rule 44 (g) of the aforesaid rules and regulations, have misrepresented certain of their fur products as being:

(1) from the stock of a business in the state of liquidation; and

(2) from the stock of a business consolidated with that of a famous mink manufacturer.

c. Respondents, by doing the acts and engaging in the practices above found, have failed to maintain full and adequate records disclosing the facts upon which the claims and representations were based, in violation of Rule 44 (e) of the aforesaid rules and regulations. [147]

First Conclusion

It is concluded that this proceeding is in the public interest for the protection of consumers and others within the purpose and intent of the Fur Products Labeling Act; that respondents through misbranding, false, misleading and deceptive statements, representations and advertising, and false invoicing of fur products as covered, in Paragraphs 1-8, inclusive, intended to, and did, aid, promote and assist, directly or indirectly in the sale of said fur products; and that the use of the aforesaid practices by respondents has been and is unlawful within the meaning of the Fur Products Labeling Act and of the rules and regulations promulgated thereunder and constitute unfair methods of competition, and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

9. By means of the statements contained in advertisements, typical examples of which are set forth above, respondents represented that the firm of Pelta Furs, and the owners thereof, were going out of the fur business; were discontinuing operations, and disposing of or liquidating their entire stock of fur products at "distress" prices, and that members

of the public could purchase such products at, or for less than, the amount respondents had paid for them. The record shows, however, that respondents did not go and are not now out of the fur business; did not discontinue operations and did not dispose of or liquidate their entire stock at "distress" prices or otherwise. Accordingly, the aforesaid representations as to reduced prices and as to savings to be effectuated thereby, and respondents' acts, practices, statements and representations relating thereto, are false, misleading and deceptive.

10. By means of statements contained in advertisements, typical examples of which are set forth above, and by oral representations made by respondents or their sales people, respondents represented directly or by implication that price tags affixed to fur products offered for sale by them were the usual prices charged by respondents for their fur [148] products in the recent regular course of business. The evidence substantiates and it is found that said quoted prices were primarily for bargaining purposes; the actual price at which respondents generally expected to and did sell such fur products during the recent regular course of their business was a lower price, as set forth in a series of coded prices on the price tags. The final coded price represented the lowest price at which the fur product can be sold and still permit respondents to make a profit. The selling prices so represented in code were not understandable as a price marked on said price tags to a substantial portion of the purchasing public,

but could be easily understood by respondents and their sales people.

Respondent Jacques De Gorter testified that he sold fur products, or authorized their sale, at any of the three prices marked on the price tag, preferably the maximum. He further testified that if a customer would not purchase at the higher price but offered a price within the maximum and minimum code prices, then he would on occasion sell, or authorize the sale, at the price offered.

Accordingly, it is found that when respondents advertise a sale and list the plainly ticketed price as one at which a fur product has been customarily and usually sold in the recent course of business they are using fictitious prices. And, by use of the comparative prices as shown in the above-quoted advertisements, respondents have misrepresented the savings to be effected by prospective purchasers of their fur products. In summary, by affixing to fur products price tags showing plainly marked price values containing fictitious prices and by the afore-said advertised reductions in price, such as one-half off and by comparative pricing, coupled with oral representations made by respondents and their sales people, respondents are found to have engaged in false, misleading and deceptive practices.

It is further established by stipulation and other probative evidence that respondents by means of illustrations or depictions of higher priced or more valuable fur products than those actually [149] available for sale at the advertised selling price have

represented that such fur products are of a higher grade, quality, or value than is the fact.

11. The complaint herein alleges and the record shows that the principal acts and practices complained of occurred in 1953, prior to the dissolution of the partnership between the two respondents, which occurred on January 31, 1954. The withdrawal of Suze C. De Gorter from the business of Pelta Furs, after participation in the commission of unlawful acts and practices, does not absolve her from responsibility therefor under the Federal Trade Commission Act and the Fur Products Labeling Act. Furthermore, the record contains no evidence which would give adequate assurance to the Federal Trade Commission that she would not again participate in such acts in the future. Accordingly, respondent Suze C. De Gorter must be held equally responsible with respondent Jacques De Gorter for the acts and practices herein found to be in violation of the Fur Products Labeling Act and the Federal Trade Commission Act. Therefore, the dismissal of the complaint as to her is not warranted.

Final Conclusions

It is concluded, as previously indicated, that this proceeding is in the public interest, and that the use by respondents of the false and misleading statements and representations covered in Paragraphs 9 and 10 above has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representa-

tions were and are in fact true, and to induce the purchase of substantial quantities of respondents' fur products by reason of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors, and substantial injury has been and is being done to competition in [150] commerce.

It is further concluded that the aforesaid acts and practices of respondents, covered in Paragraphs 9 and 10 above, are all to the prejudice and injury of the public and of the respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

It Is Ordered that respondents, Jacques De Gorter and Suze C. De Gorter, individually and as co-partners trading as Pelta Furs or under any other trade name, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, or the sale, advertising or offering for sale, or the transportation or distribution of any fur product in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured;

2. Failing to affix labels to fur products showing:

a. The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and [151] regulations;

b. That the fur product contains or is composed of used fur when such is a fact;

c. That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur when such is a fact;

e. The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

f. The name of the country of origin of any imported furs used in the fur product.

3. Setting forth, on labels attached to fur prod-

ucts, the name or names of any animal or animals other than the name or names provided for in Paragraph A (2) (a) above.

4. Setting forth on labels attached to fur products:

- a. Non-required information mingled with required information;
- b. Required information in handwriting;
- c. Required information in a sequence different from that required by Rule 30 (a) of the rules and regulations. [152]

5. Failing to show, on labels attached to fur products, all of the required information on one side of such labels.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

a. The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

b. That the fur product contains or is composed of used fur when such is a fact;

c. That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is a fact;

e. The name and address of the person issuing such invoices;

f. The name of the country of origin of any imported furs contained in the fur product.

2. Using on invoices the name or names of any animal or animals other than the name or names provided for in Paragraph B (1) (a) above, or setting forth thereon any form or misrepresentation or deception, directly or by implication, with respect to such fur products.

3. Setting forth required information in abbreviated form. [153]

4. Failing to show the item number or mark of fur products on the invoices pertaining to such products, as required by Rule 40 of the rules and regulations.

C. Falsely or deceptively advertising fur products, through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose:

a. The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

b. That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur when such is a fact;

c. The name of the country of origin of imported furs contained in fur products.

2. Represents directly or by implication:

a. That the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent regular course of their business;

b. That a sale price enables purchasers of fur products to effectuate any savings in excess of the difference between the said price and the price at which comparable products were sold during the time specified or, if no time is specified, in excess of the difference between said price and the current price at which comparable products are sold; [154]

c. That an amount set forth on price tags, or otherwise relating or referring to fur products, represents the value or the usual price at which said fur products had been customarily sold by respondents in the recent regular course of their business, contrary to fact;

d. That any such product is of a higher grade, quality, or value than is the fact, by means of illustrations or depictions of higher priced or more valuable products than those actually available for sale at the advertised selling price, or by any other means.

e. That any of such products are:

1. from the stock of a business in a state of liquidation, contrary to fact;

2. from the stock of a business recently consolidated with another, contrary to fact.

3. Makes pricing claims or representations of the type referred to in Paragraph C (2) (a), (b), and (c) above, unless there is maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

It Is Further Ordered that respondents, Jacques De Gorter and Suze C. De Gorter, individually and as copartners trading as Pelta Furs or under any other trade name, and respondents' representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of fur products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do further cease and desist from making, directly or by implication, any of the representations prohibited by Paragraph C (2) of this order. [155]

It Is Further Ordered that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission. Commissioners Gwynne and Mason dissenting in part.

/s/ ROBERT M. PARRISH,
Secretary.

Issued: May 11, 1956.

[3 sets of initials.]

Attached is Opinion of the Commission by Commissioner Kern.

Also attached is Opinion of Chairman Gwynne dissenting in part joined in by Commissioner [156] Mason.

United States of America,
Before Federal Trade Commission

Docket No. 6297

Commissioners:

John W. Gwynne, Chairman;
Lowell B. Mason,
Robert T. Secrest,
Sigurd Anderson,
William C. Kern.

In the Matter of:

JACQUES DE GORTER and SUZE C. DE
GORTER, as Individuals and as Co-Partners
Trading as PELTA FURS

OPINION ON APPEAL FROM
INITIAL DECISION

By Kern, Commissioner:

Respondents, retailers of furs, were charged in a complaint, issued February 25, 1955, with false advertising, misbranding and false invoicing of fur products in violation of the Fur Products Labeling Act and rules and regulations promulgated thereunder, and, further, the acts complained of also

were alleged to constitute unfair methods of competition and unfair and deceptive practices under the Federal Trade Commission Act.

In due course, the hearing examiner filed his initial decision in which he found that respondents had engaged in all of the questioned acts and practices. On the basis of these findings he concluded that such acts constituted unfair and deceptive acts and practices and unfair methods of competition in commerce "within the intent and meaning of the Federal Trade Commission Act."

Both sides have appealed from the initial decision. Respondents contend on appeal that the complaint against them should be dismissed. Counsel in support of the complaint appeals from the failure of the hearing examiner to prohibit as violative of the Fur Products Labeling Act, [157] as well as the Federal Trade Commission Act, respondents' use, in their advertising, of fictitious or false comparative price and value representations as to fur products.

The facts in this proceeding are not seriously in dispute. Most of the factual issues have been resolved by stipulations between counsel and the only issues remaining for consideration arise out of disputed interpretations and conclusions to be drawn from facts on the record, stipulated and otherwise.

Respondents' contention that no cease-and-desist order should be entered against them essentially is based upon a two-pronged plea:

(1) That respondents were not, and are not now, engaged in interstate commerce.

(2) That Rule 44 (a) to (g), inclusive, of the rules and regulations promulgated by the Commission under the Fur Products Labeling Act, is not binding upon respondents since it, Rule 44, is beyond the Commission's authority under that Act.

On the question of whether respondents are engaged in commerce, it was stipulated on the record by agreement of counsel, and the hearing examiner found, that respondents are in substantial competition in commerce with other firms, corporations, co-partnerships and individuals also engaged in the sale of fur products to members of the purchasing public. And, the hearing examiner found uncontroverted evidence showing that 25% of the fur products dealt in by respondents consisted of purchases outside of California which are shipped to them at their place of business in that State, and that these products were advertised in newspapers having interstate circulation. The hearing examiner also found that respondents sold and shipped fur products to purchasers outside of California, thus engaging in a course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act. Since the record clearly discloses that respondents procured fur products outside of California and thereafter advertised them in newspapers with interstate circulation, their business activities clearly come "within the concept of commerce under the Fur Products Labeling Act." We are of the [158] opinion that the hearing examiner's conclusion that respondents' business activi-

ties come within the ambit of both Acts is correct and is substantiated on the record.

Our conclusion that respondents are engaged in interstate commerce, both as defined by the Fur Products Labeling Act and by the Federal Trade Commission Act, as indicated above, and our rulings hereinafter on respondents' second plea on appeal and on the appeal of counsel in support of the complaint render it unnecessary specifically to discuss in this opinion respondents' exceptions on appeal as such.

Respondents' second plea on appeal and the cross-appeal of counsel in support of the complaint raise the remaining issue, which we state as follows:

Is Rule 44 of the Rules and Regulations under the Fur Products Labeling Act, relating to misrepresentation of prices and values with regard to fur products, within the rule making authority conferred upon the Commission by the Act?

Under Section 8 (b) of the Fur Products Labeling Act, the Commission is both empowered and directed to prescribe rules and regulations governing the manner of disclosing information required by the Act and those necessary and proper for purposes of its administration and enforcement. Agency rule-making authority embraces statements of general applicability designed to implement or interpret existing law and policy. Hence, if the acts cataloged as price misrepresentations and the matters which persons are forbidden to "advertise"

under the various paragraphs of Rule 44 are practices forbidden under the Act itself, then the rule must be regarded as a valid exercise of the Commission's authority to promulgate rules.

The validity of the rule's prohibitions against pricing misrepresentations turns primarily on the meaning of the following underscored language in Section 5 (a) (5):

“Sec. 5 (a). For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or [159] assist directly or indirectly in the sale or offering for sale of such fur product or fur——

* * *

(5) contains the name or names of any animal or animals other than the name or names specified in Paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur; * * *” (Underscoring supplied.)

There can be no doubt but that the underscored language, when literally read, comprehends all forms of misrepresentation or deception in connection with the advertising of furs and fur products. That this phrase constitutes a separate and substantive rule of law rather than a mere amplification of other requirements of the Act also is clear. Attesting to this is the fact that a comparable provision in reference to false invoicing (Section

5 (b) (2)) is likewise prefaced by the disjunctive “or” and in the misbranding section (Section 4 (1)) a similar expression is entirely segregated from the requirements for affirmative disclosure as to the presence of used fur, waste fur, and other matters and is an integral part of one of the various definitive provisions relating to misbranded fur products. Thus, under that subsection, a fur product is misbranded when falsely or deceptively labeled and also when the label contains any form of misrepresentation or deception with respect to it.

Relevant to this aspect and another circumstance indicating that the phrase under consideration was to stand alone is the fact that similar but not identical language appeared in the first two bills considered by the Congress on the subjects of fur labeling, advertising and invoicing. Prior to the statute’s final enactment by the 82nd Congress, legislation had been considered in the 80th and 81st Congresses. The definitions of deceptive advertising and invoicing provided under each of the two original bills introduced in the 80th Congress appeared in one section comprising one paragraph and containing two numbered provisions. Under each bill, one numbered provision forbade use of animal names other than those elsewhere specified in the Act, and the other rendered [160] advertising and invoicing false when “any other form of misrepresentation or deception other than misbranding is practiced directly or by implication in connection with the sale of such article or fur.”

The House committee considered the particular

bill pending before that body and reported out a substitute bill which treated the subjects of false advertising and invoicing separately and imposed certain affirmative disclosure requirements. The revisions necessitated for the disclosure requirements and in another respect for defining false and deceptive advertising comprised four new, separately numbered subsections, and the original two provisions were retained to constitute a fifth subsection, but without numerical differentiation between them as formerly. The language of the committee's substitute in reference to general deception was identical to that of Section 5 (a) (5), as today effective.

We note, too, that Section 5 (a) (5) of the Fur Act is somewhat analogous to Section 15 (a) (2) of the Federal Trade Commission Act. The former is in the disjunctive and consist of a specific provision that is followed by a more general provision. The specific expression condemns the use of any animal names for fur products other than those listed in the Fur Products Name Guide without regard to whether such use would be, or tends to be, deceptive. This resembles the flat prohibition of Section 15 (a) (2) of the Federal Trade Commission Act against the use of dairy terms in oleomargarine advertising suggesting that such margarine is a dairy product and irrespective of whether deception has been engendered. As recently held in *Reddi-Spred Corp. v. Federal Trade Commission*, No. 11673, 3d Cir., Jan. 18, 1956, it is not necessary for the Commission to prove deception in proceedings instituted under the section relating to the

advertising of margarine. It is apparent that the obvious intent and effect of the first provision of Section 5 (a) (5) of the Fur Act was to make unlawful per se the use of animal names not listed in the Fur Guide with the second element of the disjunction then providing that all forms of provable deception should also be unlawful. Reading the statute in this fashion, there is no tenable basis for conclusions that the broad provision is limited by the specific provision that precedes it. [161]

Having concluded that the provision against misrepresentation and deception was not to be a mere adjunct to other language in Section 5 (a) (5) and that it constituted instead a separate and substantive rule of law, we turn to the question of whether Congress may have intended to exclude misrepresentation of prices from its application. While the legislative reports do not specifically or expressly indicate that Congress intended to proscribe pricing misrepresentations, neither do they show that this form of misrepresentation was to be excluded. The report submitted in the House which antedated the brief conference report on the final draft of bill emphasized the requirements for affirmative disclosure set out in Sections 4 and 5. However, the report submitted by the Senate Committee which antedated the conference report referred to Section 4 relating to misbranding and stated that a product would be considered to be misbranded if falsely or deceptively labeled or identified or "if the label contains any form of misrepresentation or deception"; and it added, among other things, that

Section 5, the false advertising section, closely followed the language of Section 4.

Nor does the testimony received during the legislative hearings contain any conclusive indication that instead of a literal interpretation the phrase under consideration should be given some secondary meaning, perhaps, restricting it to advertising misrepresentations solely related to physical or zoological characteristics and attributes of fur articles. On the contrary, there was recognition in certain of the testimony as to enforcement problems then being encountered by the Commission in the administration of its Trade Practice Rules for the Fur Industry, particularly those directed against price misrepresentations. Two of those rules (Rules 25 and 29) had provisions similar to those in Rule 44.

The absence of references in the Act to pricing misrepresentations is nowise controlling. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945). Furthermore, statutory expressions are to be broadly construed within the limitations of their literal meaning and the ascertainable legislative intent. The [162] plain meaning of the statute will prevail as long as it does not lead to absurd results or clash with policy behind the legislation. *U. S. v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940).

In the circumstances here, moreover, we are convinced that the Congress' goal was a legislative solution of the fur industry's major problems, including that of deceptive pricing representations and that, when enacting this legislation, its intention was to proscribe all deceptive advertising practices in connection with the sale of fur articles.

The respondents' appeal is without merit and denied accordingly. The appeal of counsel supporting the complaint challenges, among other matters, the initial decision's failure to prohibit all of the practices covered therein, including particularly respondents' pricing practices, as violative of the Fur Products Labeling Act and the rules and regulations promulgated thereunder. His appeal is granted. Having determined that the initial decision was deficient in that and related respects, we, in the discharge of the ultimate responsibility for determining the merits of this proceeding and in the interests of conforming its disposition with the views expressed in this opinion, have appended hereto the Commission's findings as to the facts, conclusions and order to cease and desist. These are adopted in lieu of the initial decision of the hearing examiner which is hereby vacated and set aside.

Commissioners Gwynne and Mason dissented in part in the decision herein.

May 11, 1956. [163]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

OPINION OF CHAIRMAN GWYNNE,
DISSENTING IN PART

By Gwynne, Chairman:

I dissent from that part of the majority opinion which grants the appeal of counsel supporting the complaint. It is my view that Rule 44 of the Rules and Regulations under the Fur Products Labeling Act is not warranted by anything in that law.

The hearing examiner found that certain practices of respondents violated the Fur Products Labeling Act and issued an order accordingly. He also found that respondents had made certain other representations which were contrary to the Federal Trade Commission Act and issued an order in accordance with such findings.

I agree with his findings and order.

Authority for Rule 44 and for the conclusion of the majority is claimed to be found in the underlined portion of Section 5 (a) (5) of the Fur Products Labeling Act. Section 5 (a) (5) is as follows:

“(5) contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur”; [164]

The majority opinion contains the following:

“There can be no doubt but that the underscored language, when literally read, comprehends all forms of misrepresentation or deception in connection with the advertising of furs and fur products. That this phrase constitutes a separate and substantive rule of law rather than a mere amplification of other requirements of the Act also is clear.”

On the basis of this interpretation, the majority opinion “vacated and set aside” the initial decision and adopted new findings in lieu thereof and issued a new order. Among other things, the order prohibits advertising which represents directly or by implication:

“a. That the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent regular course of their business;

“b. That a sale price enables purchasers of fur products to effectuate any savings in excess of the difference between the said price and the price at which comparable products were sold during the time specified or, if no time is specified, in excess of the difference between said price and the current price at which comparable products are sold;

“c. That an amount set forth on price tags, or otherwise relating or referring to fur products, represents the value or the usual price at which said fur products had been customarily sold by respondents in the recent regular course of their business, contrary to fact;

“d. That any such product is of a higher grade, quality, or value than is the fact, by means of illustrations or depictions of higher priced or more valuable products than those actually available for sale at the advertised selling price, or by any other means;

“e. That any of such products are:

“1. from the stock of a business in a state of liquidation, contrary to fact; [165]

“2. from the stock of a business recently consolidated with another, contrary to fact.”

Such an order is justified under the Federal Trade Commission Act but not under the Fur Products Labeling Act.

The interpretation placed by the majority on the Fur Products Labeling Act violates well-established principles of statutory construction and is contrary to the intent of Congress in passing the Act. The clause in question, instead of being a separate and substantive rule of law is limited by the specific provision which precedes it. This is in accordance with the principle of *ejusdem generis*. “*Ejusdem generis* means literally of the same kind or species.” *People v. Machalski*, 115 N.Y.S. 2 (d) 28.

“The principle (*ejusdem generis*) requires that general terms appearing in a statute in connection with precise, specific terms shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms. In other words, the precise terms modify, influence or restrict the interpretation or application of the gen-

eral terms where both are used in sequence or collocation in legislative enactments.” *State v. Thompson* (Washington, 1951), 232 P. 2 (d) 87.

“The rule is based on the supposition that if the legislature had intended the general words to be considered in an unrestricted sense, it would not have enumerated the particular things.” *Smith v. Higginbothom* (Maryland, 1946), 28 A. 2nd 754.

The law itself and the Congressional history also throw light on the proper interpretation of the section in question. Paragraphs (1), (2), (3) and (4) of Section 5 (a) contain specific provisions prohibiting false advertising relating to the character or quality of the fur itself. Paragraph (5) contains another specific provision, to wit, that the advertisement shall not contain “the name or names of any animal or animals other than the name or names specified in Paragraph (1) of this subsection.” Congress evidently concluded that some amplification of that provision was necessary. For example, deception might be caused as to the character or quality of furs by means other than the use of names; pictures or slogans or other means could be employed which might not come within the strict category of “names.” [166]

Paragraph (6) prohibits an advertisement which “does not show the name of the country of origin of any imported furs or those contained in a fur product.” If the majority view is correct, Paragraph (6) is not necessary and adds nothing to Section 5. In fact, that is true of the other paragraphs in the section.

I fail to see how the use of the disjunctive “or” supports the majority view. The word “or” is common in many statutes where the principle of ejusdem generis was held applicable. Nor can I see any analogy between the section here considered and Section 15 (a) (2) of the Federal Trade Commission Act. There is nothing in the Act or in the legislative history to indicate that Congress intended the Fur Products Labeling Act to cover the types of deceptive advertising heretofore set out.

I would adopt the findings and order of the hearing examiner and deny both appeals.

Commissioner Mason joins in this dissent.
May 11, 1956. [167]

Before the Federal Trade Commission
Docket No. 6297

In the Matter of:
JACQUES DE GORTER and SUZE C. DE
GORTER, as Individuals and as Co-Partners
Trading as PELTA FURS

Tuesday, July 5, 1955

Met, pursuant to notice, at 10:00 a.m.
Before: Abner E. Lipscomb, Trial Examiner.

Appearances:

EDWARD F. DOWNS,
Attorney for the Federal Trade
Commission.

J. J. WALLEY,

Attorney for the Respondents, Jacques De
Gorter and Suze C. De Gorter.

PROCEEDINGS

Hearing Examiner Lipscomb: The hearing will come to order. Let the record show that on June 20th, 1955, counsel for the respondent filed in the Office of the Federal Trade Commission in Washington, D. C., a motion for continuance which was rejected by the Hearing Examiner orally on June 20, 1955. Both respondent and counsel for respondent are present in the hearing room, and the Hearing Examiner wishes to express to them his appreciation for their cooperation, realizing that there has been a considerable hardship placed upon them to meet this engagement.

Before we receive evidence in support of the complaint, I should like to go off the record a few minutes.

(Discussion off the record.)

Hearing Examiner Lipscomb: On the record.

Mr. Walley: The respondent Jacques De Gorter only is willing to stipulate as follows, only to him, that he has committed the acts contained in Paragraph 6 of the complaint and all the subdivisions contained there, A, B and C, but that he does not stipulate to the language contained therein which is a conclusion. The words "falsely and deceptively" he does not stipulate; that his acts were falsely,

shall we say we strike from Paragraph 6 the words "Falsely and deceptively."

All the rest of Paragraph 6 may be deemed to be stipulated to by this respondent. [3*]

The respondent stipulates that he has committed the acts contained in Paragraph 9 in the complaint and Paragraph 10, and Paragraph 11, and Paragraph 12, and Paragraph 13, and Paragraph 14, and Paragraph 15. Respondent further stipulates that as to Paragraph 21, that the facts therein alleged are true and correct. It is further indicated by the respondent Jacques DeGorter that should the Court find in the final conclusion, of course, that he is engaged in interstate commerce, that it has no objection to a cease and desist order being made, and which appears as the cease and desist order which would be made following the complaint, with respect to Subdivision A, and all of the subdivisions thereunder; Subdivision B, and all the subdivisions thereunder, and all of Subdivision C, C Subdivision 1, Subdivision A, Subdivision B, Subdivision C, except with respect to the language contained in Subdivision C, the words, "falsely or deceptively" should be stricken as being a conclusion which follows from the acts complained thereof in the subparagraphs A, B and C.

I believe that is all of the matter that we will stipulate to as to the respondent Jacques DeGorter.

Hearing Examiner Lipscomb: Off the record.

(Discussion off the record.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Hearing Examiner Lipscomb: On the record.

Mr. Walley: It will be further stipulated that the respondent Suze DeGorter may be joined to the same stipulation [4] as was entered into between the Government and respondent Jacques DeGorter. It is further stipulated, however, that the respondent, Suze DeGorter, has not committed any of the acts referred to in the stipulation since January 31, 1954, and that she has had no financial interest of any kind in Pelta Furs since January 31, 1945.

Mr. Downs: That is satisfactory.

Hearing Examiner Lipscomb: All parties present approve the stipulation as stated?

Mr. Downs: Yes.

Mr. Walley: Yes.

Hearing Examiner Lipscomb: The stipulation is approved and accepted.

Off the record.

(Discussion off the record.)

Hearing Examiner Lipscomb: On the record.

Mr. Walley: May I point out before Mr. Downs proceeds, that we have not stipulated that the respondent, or either of them, were engaged in interstate commerce, so that the burden of proof as to that fact still rests with the Government.

Mr. Downs: I am aware of that; I know that is one of the primary issues in the case.

Call Mr. DeGorter. [5]

JACQUES DeGORTER

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Downs:

Q. Will you give your full name, please?

A. Jacques DeGorter.

Q. And your address, sir.

A. 1881 North Stanley Avenue.

Q. What is your occupation or business, Mr. DeGorter? A. I am a furrier.

Q. And what is the name of your company?

A. Pelta Furs.

Q. Is that a proprietorship, partnership, or corporation? A. Sole ownership.

Q. Are you the sole owner?

A. I am the sole owner.

Q. And where is that located, sir?

A. 437 West Seventh Street.

Q. And how long have you been in the fur business? A. 39 years.

Q. Not always at that address; were you, sir?

A. No, sir.

Q. Has it always been a proprietorship?

A. No, sir. [6]

Q. Before it was a proprietorship, what type of business was it? A. It was a partnership.

Q. And who was your partner?

A. Mrs. Suze DeGorter.

Q. And when was that partnership terminated?

(Testimony of Jacques DeGorter.)

A. The last day of January, 1954.

Q. During the time that it was a partnership, under what name did you do business?

A. Pelta Furs.

Q. And at the same location?

A. Same location.

Q. What steps were taken by you, sir, in dissolving the partnership?

A. A petition for dissolution of the partnership was filed within the County Recorder of the County of Los Angeles.

Q. When was that filed?

Mr. Walley: If the Court please, I am going—just a moment—I thought that we had stipulated that that partnership was dissolved. I don't see any need to go into an examination as to those facts in view of the stipulation.

Mr. Downs: There is no question about the partnership being dissolved. These questions are aimed primarily at the allegations in the complaint with regard to the advertisements that he was going out of business, going out of business [7] sale, and I am not trying to question the stipulation as to Mrs. DeGorter's leaving the partnership, but I do believe that this information will be pertinent to that allegation.

Mr. Walley: If that is the purpose, then I have no objection.

Mr. Downs: That is the sole purpose. I am not questioning that Mrs. DeGorter left the partnership at all.

(Testimony of Jacques DeGorter.)

A. On or about the middle of January, 1954.

Q. (By Mr. Downs): That was when your dissolution papers were filed?

A. Pardon me, will you repeat your question again? Your question was, I thought, when did you take steps to file dissolution?

Q. Yes; that's right.

A. It was on or about the middle of January, 1954.

Q. Yes. Now, Mr. DeGorter, you are here as a result of a subpoena, you were also served with a notice to bring with you certain documents; is that correct? A. Yes, sir.

Q. Do you have those documents with you, sir?

A. Yes, sir.

Q. I would like at this time to call upon you for the documents requested, the shipping orders, Items No. 1 through 15 of the documents that were requested. May I have those, sir?

A. Mr. Anderson took photocopies of these shipping orders. [8] I brought the original sales because when Mr. Anderson brought the shipping orders back, they were not filed back in their original places, and I spent half of my holiday to look for them, but I have the original sales slips and since I thought that you wanted to establish the cities where the shipments were made to and since Mr. Anderson has the photocopies, maybe I can testify from photocopies as correct, and avoid further—

Q. All right, that is satisfactory to me; I just

(Testimony of Jacques DeGorter.)

wanted to avoid the question of the best evidence in trying to use the photostats.

Mr. Downs: If I may again indulge the Court while I remove the photostats from the file, I anticipated using the originals.

Hearing Examiner Lipscomb: Off the record.

(Discussion off the record.)

Hearing Examiner Lipscomb: On the record.

Mr. Downs: Will you mark these for identification as Commission's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8, for identification, please?

(The papers referred to were marked Commission's Exhibits 1 through 8 for identification.)

Q. (By Mr. Downs): Mr. DeGorter, I hand you what has been marked for identification as Commission's Exhibits 1 through 8 for identification, and ask you to look at those and tell me, if you [9] will, what they are, sir?

A. They are sales slips.

Q. Pelta Furs sales slips? A. Yes, sir.

Mr. Downs: First I will offer in evidence Commission's Exhibits 1 through 8, being photostatic copies of Pelta Furs sales slips.

Hearing Examiner Lipscomb: The tendered Exhibits 1 through 8 are received in evidence.

Mr. Walley: I have no objection, but would you tell me, Mr. Downs, the corresponding numbers, please, the numbers that you put on there?

(Testimony of Jacques DeGorter.)

Mr. Downs: Yes; 29 is 1, and so forth.

Mr. Walley: I see.

(The documents referred to, heretofore marked for identification Commission's Exhibits 1 through 8, were received in evidence.)

Q. (By Mr. Downs): Mr. DeGorter, these sales slips, Commission's Exhibits 1 through 8, indicate that furs were purchased from Pelta Furs to be shipped to addresses indicated thereon, which were outside of the State of California; is that correct, sir? A. Yes.

Q. Mr. DeGorter, were these furs sold according to these sales slips actually shipped to the addresses noted hereon? [10] A. Yes, sir.

Q. And they were shipped by Pelta Furs; is that correct? A. Yes, sir.

Q. May I ask you, sir, if in the State of California, you have an obligation in the conduct of your business to collect a sales tax on furs that you sell? A. Yes, sir.

Q. And you do not collect that tax, is that correct, on furs that are shipped outside of the State; is that correct? A. Yes, sir.

Q. And on these purchases on Commission's Exhibits 1 through 8, you did not collect the sales tax?

A. Yes.

Q. Now. in shipping these garments, did you insure them?

A. No, sir; we did not take any special precau-

(Testimony of Jacques DeGorter.)

tions for that because all our shipments are automatically insured in and out of the State.

Q. What do you mean, "automatically insured"?

A. We have a binder with the insurance company that everything we ship with common carrier in the United States is insured for the cost of the merchandise.

Q. You are insured for the cost of the merchandise; is that for your cost?

A. For our cost.

Q. Or the sales price? [11]

A. No; our cost; replacement value.

Q. And that applied to these purchases indicated by Commission's Exhibits 1 through 8?

A. Yes, sir.

Q. And that insurance, if these became lost, would be payable to Pelta Furs; is that correct?

A. Yes, sir.

Q. It is noted that on Commission's Exhibit No. 8 that there was a 60-day charge sale; is that correct?

A. That is correct, sir.

Q. It is also noted that the sale on Commission's Exhibit No. 5 was on a 60-day account; is that correct?

A. On the balance.

Q. Yes; on the balance. And will you explain the sale on Commission's Exhibit No. 3; what the terms of that was?

A. That was to be paid before shipment.

Q. And explain the terms of the sale on Commission's Exhibit No. 2?

(Testimony of Jacques DeGorter.)

A. To be paid before shipment.

Q. And also on Commission's Exhibit No. 1?

A. The same thing; the same party.

Q. Those were to be paid for before shipment, on one and two; is that correct?

A. As far as I can recall; yes.

Q. None of these were C.O.D. sales; is that correct? [12]

A. Pardon me. None of the ones showed me. This one I couldn't say for sure, because this might have been C.O.D.

Q. Have you on occasions, Mr. DeGorter, shipped any furs that you have sold outside of the State of California on a C.O.D. shipment?

A. Yes, sir.

Q. Can you give me an approximation of how many such C.O.D. shipments you have made?

A. That is hard to tell; very few.

Q. But you have made them?

A. A few; yes, sir.

Q. Have you made other shipments out of the State of California other than those indicated by Commission's Exhibits 1 through 8?

A. Yes, sir; a few.

Q. Mr. DeGorter, where do you obtain the furs in your products that you sell in your store?

A. Some of them we manufacture ourselves, some from local manufacturers, and local wholesalers and some of them from New York manufacturers.

Q. What percentage of your furs do you pur-

(Testimony of Jacques DeGorter.)

chase from New York? A. That is hard to tell.

Q. Just give me an approximation, please; you won't have to be exact. [13]

A. I would say, to make it easy for you, about, over 25 per cent.

Q. Over 25 per cent of your furs are purchased from wholesalers or manufacturers located outside the State of California?

A. Yes, sir. And that figure, though, can be wrong; this is a guess.

Q. Yes; it could be more or it could be less.

A. It could be less, it could be definitely less, because we also buy in San Francisco, that is in the State of California.

Q. Now, you advertise your fur products; do you not, sir? A. I did.

Q. You did; and you advertised them in the local Los Angeles papers, to wit: The Los Angeles Times and the Los Angeles Examiner?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. Downs: I believe counsel for the respondent will stipulate that during the period covered by this complaint in this matter, the newspapers, the Los Angeles Times and the Los Angeles Examiner, in which the respondent advertised, had a circulation outside of the State of California.

Mr. Walley: It will be so stipulated.

Hearing Examiner Lipscomb: The stipulation is duly noted and accepted. [14]

Afternoon Session—1:00 P.M.

Hearing Examiner Lipscomb: The hearing will come to order. Mr. Downs, you may proceed with your examination of the witness.

JACQUES DeGORTER

resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Downs:

Q. Mr. DeGorter, I would like to inquire of you as to some of the fur products that are imported. You have been in the business a long time and I imagine that you are somewhat of an expert on furs.

Is kid, or so-called kidskin an imported fur?

A. Can be a local fur or an imported fur. Kid is a young of the goat.

Q. They use the domestic goats for that?

A. They use some domestic goats, they use African, they use South American, but they certainly use domestic.

Q. How about the marmot?

A. The marmot is an imported fur as a rule.

Q. As a rule?

A. I don't know of any instance—there are marmots in the United States. [16]

Q. But they are not commercial grade; are they?

A. I don't know of any instance that I ever was aware of using native marmots for furs.

(Testimony of Jacques DeGorter.)

Q. Now, how about the baum marten?

Mr. Walley: If the Court please, I don't want to interrupt continually, but I would like to know what the purpose of this examination is. I believe that our stipulation has taken care of all of this material.

Mr. Downs: This still goes to commerce under the Fur Products Labeling Act. Certain furs are always imported, and where they are imported, it will follow that they will have been shipped in commerce, and I propose to show which of those furs are imported, and it following that they have been shipped in commerce, and then that the respondent has in the conduct of his business, sold garments made from those furs, further establishing the jurisdiction of the Commission under the Fur Products Labeling Act. [17]

* * *

Q. Well, you have stated, Mr. DeGorter, that you purchase approximately 25 per cent of your fur products from sources in New York; is that correct? A. Yes.

Q. Now, the majority of it you purchase locally here in California; is that correct? A. Yes, sir.

Q. Now, are some of those furs that you have purchased locally, those products made of imported furs? A. Yes, sir.

Q. Could you give us a fair estimate as to the percentage of those that are imported?

A. That is very hard to say.

(Testimony of Jacques DeGorter.)

Q. I know. [21]

A. The majority of fur we are dealing in the popular line, the muskrats, and in the better price line, minks; and muskrat and minks are both United States products for the majority. The number two item, I would say, the popular line, is marmot and squirrel; and I would say that the majority of these are imported; so in order to get a good percentage, might be five per cent, might be seven per cent; but I would really have to make a study and I will be in a position to give you a fair answer to that.

Q. But, at any rate, some of the furs that you purchase locally here have been imported furs?

A. That is correct, sir.

Q. Now, have you advertised, sold and offered for sale fur products that were shipped to you in California from your suppliers in New York?

A. Yes, sir.

Q. And you have advertised those furs in the Los Angeles Times and the Examiner?

A. Yes, sir.

Q. During the period of Government's complaint?

A. Yes, sir. [22]

* * *

Mr. Downs: May I advise counsel what it is?

Under Paragraph 5, Subparagraph C of the complaint it states, "Misrepresented the grade, quality, or value of certain of said fur products by the use of illustrations depicting higher-priced or more

(Testimony of Jacques DeGorter.)

valuable products than those actually available for sale at the advertised selling price, in violation of Rule 44(f) of the aforesaid rules and regulations.”

It is my purpose to show that the garments depicted here in Commission’s Exhibit 9, I am trying to show that those garments, those depictions are garments that are of a higher [29] quality than the garments that were for sale as advertised in the exhibit.

Mr. Walley: In that case, if the Court please, I am going to object to any further questions along this line of interrogation on the grounds that it is not material or relevant to the issues made out by this complaint under the Fur Trades Labeling Act, and all of the rules and regulations promulgated thereunder, properly promulgated thereunder, by the Federal Trade Commission.

This is going to be my main point, and I would just as leave, if the Court would permit me to argue my position now, in support of this objection, which as I say, will be the only point of objection, perhaps, that I have, and will be my argument at the close of this hearing. I will not repeat it in the future.

Hearing Examiner Lipscomb: Do you wish to place it on the record?

Mr. Walley: That is correct, your Honor.

Hearing Examiner Lipscomb: You may proceed, sir. You have no objection?

Mr. Downs: No.

Mr. Walley: If the Court please, it is our posi-

(Testimony of Jacques DeGorter.)

tion, I think it takes no citation of an authority to support the position that any administrative body has no authority or no jurisdiction to pass legislation, nor has the Congress any [30] authority to delegate to an administrative body the right to legislate. Therefore, an administrative body can only pass such rules and regulations to carry out and to enforce an act of Congress as are necessary to carry out the intent and purpose of the act and to enforce it.

It is our contention, that assuming that be the law, that the Federal Trade Commission is without any authority or jurisdiction to promulgate Rule 44 as contained in their rules and regulations and all of the subdivisions contained therein. [31]

* * *

Hearing Examiner Lipscomb: The objection which counsel for the respondent has raised is a very interesting one, a very serious one; in effect, it challenges jurisdiction in part of the complaint and the jurisdiction of the Commission that issued that complaint. It is a question which the Hearing Examiner would prefer to take under consideration before ruling. However, the objection rises as an objection to the introduction of testimony and accordingly, a ruling must be made forthwith.

Accordingly, the Hearing Examiner overrules respondent's objection to the admission of the evidence and will allow counsel supporting the complaint to proceed. This does not mean, however, that the Hearing Examiner will not reconsider this

(Testimony of Jacques DeGorter.)

problem upon his final consideration of the case when all the evidence is in and before him.

Mr. Walley: I appreciate that.

Hearing Examiner Lipscomb: You may proceed, sir. [46]

* * *

Q. You might——

Mr. Walley: If I might interrupt for a moment, may we go off the record?

Hearing Examiner Lipscomb: Off the record.

(Discussion off the record.)

Hearing Examiner Lipscomb: On the record.

Mr. Walley: It is stipulated by respondent Jacques DeGorter that he violated the provisions of Subdivision (f) of Rule 44 of the Rules and Regulations and that the violations contained in this stipulation replace the violations charged in the complaint in Subdivision (c) of Paragraph 5.

Hearing Examiner Lipscomb: Does that meet with your approval?

Mr. Downs: Yes, sir.

Mr. Walley: It is further stipulated by said respondent that he has committed the acts alleged in Subdivision (d) of Paragraph 5 of the complaint.

It is further stipulated by said respondent that he placed in the Los Angeles Examiner and in the Los Angeles Times advertisements containing the language quoted in Paragraph 17 of the complaint.

It is further stipulated that with respect to the

(Testimony of Jacques DeGorter.)

foregoing three stipulations that respondent has not waived his right to attack the validity of the rule, of the rules and regulations referred to in the complaint as having been [52] promulgated by the Federal Trade Commission without authority or jurisdiction of the provisions and the purpose and intent of the Fur Products Labeling Act.

I think that for clarity where I referred to rule of the rules and regulations that should read Rule 44 and all of its subdivisions.

Hearing Examiner Lipscomb: Is the stipulation agreeable to both parties?

Mr. Downs: Yes.

Mr. Walley: Yes.

Hearing Examiner Lipscomb: And counsel is assured of his right to contest the validity of Rule 44, or any other rules that may be involved in these stipulations, that is preserved to him.

Off the record.

(Discussion off the record.)

Hearing Examiner Lipscomb: On the record.

Q. (By Mr. Downs): Mr. DeGorter, will you explain to us for the record your method of pricing your products, fur products, when they are received, sir?

Mr. Walley: That is objected to, if the Court please, on the grounds that it is irrelevant, immaterial and not competent. And the issues made out by the complaint and the rules and regulations properly promulgated by the [53] Commission un-

(Testimony of Jacques DeGorter.)

der the Fur Products Labeling Act, the grounds for the objection is the same which I have heretofore made. I don't believe it is necessary to repeat it at length.

Hearing Examiner Lipscomb: Your objection is duly noted and overruled. Counsel will proceed.

Mr. Walley: The objection will be to the line of questioning involving comparative prices and anything to do with prices.

Q. (By Mr. Downs): Will you proceed?

A. My merchandise, the stockroom is accompanied by a bill. The items will then be numbered in rotation and entered in the existing stock inventory. Tickets will be affixed to the garment, carrying the same number as has been put on the invoice in duplicate. Cost price is then in code put on the lower part of the price ticket. This is mainly done to help the office staff to establish the cost by taking the item out of the inventory again, checking on the cost.

Pricing is all done by me. There are a few different methods of pricing. There is a standard mark-up which we have figured out from 25 dollars to \$2,500. What the standard percentage in profit will be, there is a list prepared, indicating that if the cost price of an item is \$150, the normal selling price is an amount higher than \$150.

There are some cases that we just don't look into that [54] list. These cases are in the first place when we manufacture the item ourselves, in which case our profit mark-up would be more or less.

(Testimony of Jacques DeGorter.)

The price will be established according to the physical look of the finished product. This might involve artistry, being a step ahead of competition, a very lucky purchase; from all these reasons, or all these reasons taken into consideration, I would take the item and look at it and decide how much money it could bring, what would the consumer be willing to pay for it. It looks good, it can bring so much money, it compares very well with another item that is sold for that price.

In a case like that, and in many of these cases, the cost price does not interest a furrier at all. The cost price, though, will interest the merchant, because he could not rest for the fact that item could not be sold because he over-estimated the amount that he thought he might get for it.

In order to overcome this, for 38 years I made it a habit to, a practice, to indicate in a certain code to my sales people that on the less favorable circumstances, this item can be sold for a code price, which was marked on the ticket. I followed this system up till today. I also use these code prices to meet promotional advertising of competitors. I might step in on Monday morning in my place of business with the Sunday papers in which the one store in town advertises a certain item that normally is sold for \$150 for \$88, and in our [55] store as a special promotion. I am talking about big stores, for an item for \$250 that we normally try to sell for three-ninety, four-fifty. That day, I would tell right at the start of business to my

(Testimony of Jacques DeGorter.)

manager or the employees, "Store A is selling scarves today for \$88, let's sell all our scarves for the low." They know that the low means the lowest possible profit that we are willing to take on that item, so that we presently are just covered for overhead expenses and service that we have to give to the customers.

And at the same time I will say, "Well, the department store here on the other side of the street has a muskrat special for \$122, so don't let anybody undersell you with muskrat." Experience taught me that when these big stores have the big ads in, the people are asking for these items, just acting as if they did not see the ad of the other, but they just probably came back from the other store and they want to see if they got a real buy there or not, or if they could do any better.

So, by me watching these trends, they will be able to do better or just as good, even if I have to sell without profit.

I have to give this lengthy explanation because it seems to be a very easy question, how do you price this merchandise; but it is not so easy to answer, because situated between the May Company, the Broadway, the Robinson, Bullock's and Haggerty's and other two stores that are selling furs, we had [56] days that there wasn't almost one item that we could sell at a regular price without coming in friction with one of their promotions.

With that thought in mind, we start out pricing

(Testimony of Jacques DeGorter.)

our merchandise with a decent, good mark-up, as high as we expect the customer would be willing to pay for a good made fur garment, and made out of good quality. It is too bad to admit, too often we are not in a position to get that price, due to competition. So, based on this explanation, that is how our pricing is done.

Q. Now, as I understand it, you put one price on your merchandise in a non-coded manner so that anyone can see it? A. Yes, sir.

Q. And then you also put on that price tag in code another price? A. Yes, sir.

Q. Do you put one or two?

A. I put two of them.

Q. Two coded prices on there, each of them progressively smaller? A. Yes, sir.

Q. Now, is this higher figure which is non-coded, is that representative of what you consider to be the value of the garment?

A. That is representative of our regular selling price. The [57] value of the garment is the price I am willing to pay for it, that is what I consider the value.

Q. The price you are willing to pay for it?

A. I am willing to pay for it, that is right; that is what I consider the value of a fur garment.

Q. Well, now, when you advertise a fur garment as being a certain value but for sale at a lower price, well, now, obviously the value that you placed on it there is not what you have paid for it?

A. No, certainly not; certainly not

(Testimony of Jacques DeGorter.)

Q. Is that value that you place in that ad the price——

A. Referring to a retail price, because the ad is prepared for the retail customer.

Q. That's right; and so that value is the price that you have put on that garment?

A. As a regular selling price.

Q. As a regular selling price in a non-coded manner? A. Yes, sir.

Q. Now, do you have any way of ascertaining, or have you ascertained the percentage of garments that you sell at the non-coded price as compared to the percentage that you have to break that price on and sell it for one of the two lesser coded prices?

A. I can answer you this very clear. There is something else involved in it. When we talk about the second price, we, [58] here in Los Angeles they have the habit of month-end sales, I don't know, every month end, two days before the end of the month and carried over till the first day of the next month, all big stores have so-called month-end sales and have then special values and special discount merchandise on sale. That is the Downtown Businessmen's Association promotion.

So, the second price, which Mr. Anderson just referred to, is what we call our month-end sale price. So on our month-end, it became the habit that we never would get the printed price. When I refer to the printed price, that is the regular readable price. And that then we would get that second price.

(Testimony of Jacques DeGorter.)

Now, as an inducement for the sales people in order to get our regular price, we will give them more commission for the higher price than they would get for the lower price. The commissions once were two and three per cent, and later on have been changed to two, three, and four per cent. Still later they have been changed to two, three, and five per cent. That means on month-end they would normally—no, the second lowest price would normally constitute that three per cent sale, the lowest, the two per cent commission sale, and the printed a four per cent.

Now, on month-end during sale periods, when we had special promotional merchandise in ourself, we had merchandise priced at a sale price, the printed price was a regular sales price, merchandise just came fresh in, there wasn't any possibility [59] for the sales people to get the higher price, in that case they only got a two per cent commission. So when we started to accumulate these figures, we felt over that period that we couldn't get a standard percentage, but I have a commission book with me that I hope I can have photostats taken of it, if we still use it because it is still in use, you see, we are marking in it today, so I can't present it as testimony because the commissions of tomorrow have to be paid out of this book.

But, in back of every sale you will find if that sale was made, like here, just take a page, here on page 1, 2, 3, that is the return, 4, 5, 6, 7, 8, 9 sales

(Testimony of Jacques DeGorter.)

on this page for one sales person. Out of nine sales, three have been made at the low price, they are two per cent commission; one, two, three, four, five have been made at the month-end, at the middle price, and one has been made at the printed price.

So here out of nine sales we once got a five per cent sale, one, two, three, four, five times we got a three per cent sale, and three times we got a two per cent sale. Is this clear to you?

Q. Oh, that means that out of nine sales made on this particular date, only one sale brought the plainly ticketed price; is that correct?

A. Yes, sir.

Q. The other eight sales were at the coded [60] prices?

A. Yes, sir.

Q. Either the second or the lowest coded price?

A. Yes, sir.

Q. Is that approximately the percentage that this runs?

A. During the summer period; yes, because everybody, and as long as I am in the fur business, we had summer sales and August sales and slow season discounts and off-season sales, that is during the summer, that is in the months of March, April, May, June, July and August. These are months that you have to induce the customer by making her purchase because she expects to buy for less than she would have to pay around Thanksgiving Day or Christmas, otherwise, she waits until then.

When the customer comes in my place today and says, well, "I would like to lay away, buy on the

(Testimony of Jacques DeGorter.)

lay-away plan, a fur cape. I don't need it now, I want it for Thanksgiving." And we show her something, she looks at the ticket, she would ask me, "Well, this is \$275, how much would that be around Thanksgiving?"

Now, according to you, I would violate the law, I would say around Thanksgiving it would be probably \$100 more, that is violating the law the way you look at it. I won't tell her that, because that is really untrue, I say around Thanksgiving that is \$275, but if you buy it now, you will probably only have to pay \$225 so you save yourself some nice money. If I would tell the woman well, no, it would cost the same today as Thanksgiving, then she would say, thank you, sir, and you would [61] just starve to death. She would say, "I will be back around Thanksgiving, why should I give you my money now." This is an established method all over the world.

Q. Well, now, you say during the summer months, I believe in the trade you refer to it as breaking the price; is that the way you refer to it?

A. No; we never say break the price, we only talk about promotional, and we talk about slow season. I don't believe in price breaking, I believe in profit, because you can't give a customer service if you don't make profit, and it is dependent about service, I can keep that customer's fur looking good for ten years if I get my price for my profit, without her even knowing. Every time she brings it in to storage I work on it, that is part of my profit,

(Testimony of Jacques DeGorter.)

so I can't see how anybody can regulate my profit.

Q. Would you say that during the off-season or the summer months you only realize the plainly ticketed price in about 10 per cent of your sales?

A. I would say yes, I would be satisfied if it is not less than 10 per cent. That doesn't mean that is right, I would have to look at it, it may be more, but I still would be satisfied if it is not less than 10 per cent during the slow season.

Q. Then, during that season in approximately 90 per cent of the cases instead of selling at the plainly ticketed price you sell at one of the coded, lower coded prices; is that correct? [62]

A. That is correct on certain circumstances. See, we have a lot of Mexican trade and a lot of Chinese trade and if we just get a wave of Mexicans and Chinese in the traveling season, we never get our printed price, it is impossible to sell these people when they read \$250, they want it for less, they just walk out, we never see them again. So, if we just have a lot of tourists, Mexicans, or a lot of Chinese trade and a couple of weeks the percentage might be less.

Q. I see. Now, during what you call the fur-selling season——

A. Yes, sir.

Q. ——what percentage of sales do you realize the plainly ticketed price and what percentage do you sell it at one of the lower coded prices?

A. That depends completely upon the competition, the advertising of the competitors. We are all set and expectant to get our printed price, but two

(Testimony of Jacques DeGorter.)

and two are very often five in the fur business, it comes out different.

Q. You say you get that printed price, plainly printed price 50 per cent of the time during the first selling season?

A. No; but considerably more often than ten per cent.

Q. But you don't get it 50 per cent of the time?

A. I don't think so.

Q. So, in over half of the cases half of your sales, then, during the fur-selling season you have to sell below the plainly ticketed price? [63]

A. I couldn't say that definitely, but I take into consideration that most sales are really made during month-end.

Q. Yes.

A. And I just figure fast that month-end sales won't be printed price sales, and the other days of the month that are regular selling days, we might have two-thirds printed and one-third below.

Q. Well, now, mentioning the month-end——

A. Substantially, let's make it this, a substantial number of sales are made at the printed price.

Q. Well, now, you say a substantial number; is that half of them, more than half?

A. I would say more than half.

Q. How much more than half?

A. I couldn't say without consulting my records.

Q. Would it be 55 per cent, 60 per cent?

A. Might be; yes.

Q. Would it be 90 per cent?

(Testimony of Jacques DeGorter.)

A. I don't think so.

Q. Now, you mention these month-end sales, and those are the sales during which you sell them at one of the coded prices; is that correct?

A. Yes, sir.

Q. In preparation for that sale, do you remove the plainly ticketed price and put on there one of the coded numbers in a [64] plain manner?

A. No; I couldn't.

Q. You leave the——

A. Leave the price on and that is the reason we instruct the—there are two reasons for that, and I want to explain this fast to you. We might get a CB, that means a come-back. The customer does not decide for a fur coat so fast, so the sales person, a woman comes in and wants to see a certain sales person and says, "Last week you showed me a little mink jacket for \$450. I now brought my husband, I want to take another look at it."

Well, in all the preparatory work would be completely lost, and this is not an exception, this is a rule, that they shop before they decide, so when the woman comes in then the sales person is not going to tell her, "Now, here is that \$450 jacket you saw last week, but the boss told me this morning I can sell it for \$350." He is not going to tell her, he has already worked two months with the customer. That is one of the main reasons we can't remove the ticket.

The second reason, if we wanted to, we wouldn't have the time, we have seven, eight hundred units

(Testimony of Jacques DeGorter.)

in stock, and I would be writing tickets from morning till evening. But that is one of the main reasons that you just don't do that, you want your comebacks, they walk around with telephone numbers, business cards from people, they will take themselves three, four, five [65] months to shop for a fur. [66]

* * *

Q. Now, I will hand you what has been marked for identification as Commission's Exhibit No. 12 and ask you if this is one of your ads?

A. Yes, sir. [67]

Q. Now, this ad shows values up to \$189, now \$68?

A. Yes, sir.

Q. Now, does that \$189 figure appear on your garment?

A. At the time we sold it; yes, sir.

Q. Yes, sir?

A. Yes, sir.

Q. That was your plainly ticketed price; is that correct?

A. Yes, sir.

Q. And did the \$68 appear on your garment at that time?

A. Probably in code.

Q. Well, that would be the lesser of the three prices that your price ticket carried for that particular garment; is that correct?

A. I think that is correct, sir.

Q. And that would apply to all the seven items appearing in Commission's Exhibit No. 12?

A. Yes, sir. [68]

* * *

Hearing Examiner Lipscomb: The hearing will come to order.

JACQUES DeGORTER

resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Downs:

Q. Mr. DeGorter, when we adjourned yesterday you were to bring in some records indicating your support for the advertised values appearing in Commission's Exhibits 12 and 13 for identification. Do you have that with you now, sir?

A. Yes, sir. When I started preparing last night a new setup as the one I had for 1953, a new setup for 1953, I was half way or one-third of the way through with it, I found that in 1954, Mr. Anderson, the investigator, advised me that if we just followed the procedure of the department stores, which put their selling price——

Mr. Walley: Mr. DeGorter, I don't think you ought to go into that. I will bring that out on cross-examination.

The Witness: I wanted to substantiate these bills.

Mr. Walley: Well, let's get the information that the Government wants now and I will ask you about that, unless you have no objection to his explaining all this?

Mr. Downs: I have no objection to him explain-

(Testimony of Jacques DeGorter.)

ing, [73] because obviously you would have him explain later.

The Witness: We started then, the end of '53, started putting, or selling at the prices that we put on the tickets on the bills, and that is why I brought all the bills. I stopped doing this until I went so far, thinking that all of the information you want you will find on all the purchase invoices for 1954.

Q. (By Mr. Downs): I see.

A. Here is an invoice, this is the note, \$3,500, this invoice is paid. Here are the individual items, every item is numbered. Here you will find the cost price and here you find the selling price. These two prices refer to the prices that are on the coat, on the ticket, the last price is the printed price.

Q. I see.

A. That you find for every bill. Here is a silver-blue mink stole, this is the cost price, fifteen ninety-five is the selling price, the other price is thirteen seventy-five eleven fifty. That is a complete copy of every sales ticket. So when we refer to value, we refer to the estimated, our estimated price that we expected to get for it, which we put on the ticket at the time the merchandise came in.

Q. That was the plainly-ticketed price?

A. Plainly-ticketed price. And you find that on anything, so [74] it is up to you to ask me and I would be in a position to give you any one that you want out of here, and I thought that will solve the problem.

Q. Will you then show me the records pertain-

(Testimony of Jacques DeGorter.)

ing to the mink clutch capes and stoles valued up five ninety-five, now two eighty-eight, appearing in Commission's Exhibit 12 for identification?

A. Here is a series of mink clutches, stoles and capelets, 18, a lot of 18, which we bought for \$3,870, the 18. We priced these in here, and here are the notes which this bill is paid with.

Q. Yes.

A. I mean, we priced these in two groups, we priced them for six ninety-eight and six twenty-five. The respective low was at that time five seventy-five and five twenty-five, so I think that covers it completely, even if you take the second price, the cost price of these pieces.

Q. Your expected low was four seventy-five?

A. Not four seventy-five, five seventy-five and six ninety-eight; six ninety-eight was the three prices, so on that ticket of that clutch you could find six ninety-eight, on that ticket you could find six twenty-five, and these very lowest.

Q. Now, did you sell any of these garments at the higher price there?

Mr. Walley: I am going to object to that, if the [75] Court please, on the ground that it is immaterial and irrelevant, not within the issues made out by the complaint so far as the act and the proper rules and regulations promulgated under the act are concerned for the reason that the rule under which this evidence is sought to be adduced is Rule 44, which, while it is under attack, we as-

(Testimony of Jacques DeGorter.)

sume for the purpose of this examination is a valid rule.

That rule provides in Subdivision (a) thereof, "Nor shall any person advertise a fur or fur product at prices purported to be reduced from what are in fact fictitious prices nor at a purported reduction price when such purported reduction is in fact fictitious."

The Commission in issuing this complaint has placed a construction upon the word "fictitious" which we feel is not justified by the language of the Fur Products Labeling Act or of the rules promulgated thereunder, assuming for the purpose of this discussion that 44 is a proper rule.

It, therefore, becomes material under this complaint, properly construed under the act and the rules, whether or not any prices indicated on the tickets by the respondent were fictitious prices. The question which seeks to elicit the answer, did you sell any furs at that ticketed price, is not a proper or material question, because whether or not a fur was sold at the highest ticketed price does not establish the fictitiousness of the price. [76]

My point is based solely upon the definition of the word "fictitious" both in its legal connotation and its generally accepted connotation.

"Fictitious," as I have been able to define it from dictionaries and cases, is something that is imaginary, something contrasted with real, that is, imaginary as opposed to real. So that the only evidence we are concerned with here in order to establish

(Testimony of Jacques DeGorter.)

whether or not the highest price on the ticket was a fictitious price is the basis of ascertaining that price, how the respondent obtained the price, whether he just reached up in the thin air and got a price, which he said this was going to be the price of the fur, or whatever the basis may have been.

But, asking the witness whether or not he ever sold a fur at the highest price in no way bears upon whether or not that price was fictitious, whether it was imaginary or real, and that is the basis of our objection.

There has been evidence adduced by the Government from this witness with respect to the basis for establishing an openly ticketed price in connection with the operation of Pelta Furs, and answer was given to that question. This question, I believe, is not material to establishing whether or not the prices were fictitious or real.

Mr. Downs: Mr. Examiner, it is our purpose to show that this plainly ticketed price is in fact a fictitious price [77] because it is an imaginary price, it is a prayerful or hopeful price, it is a price that respondent prays he can get, hopes he can get, but I submit that as the facts of the case unwind it will be shown that he realizes that price in such few instances that it will be obvious that that price is what can properly be called a bargaining price from which respondent will back up in order to obtain a sale, and it is also used for the purpose of advertising and putting on a sale at

(Testimony of Jacques DeGorter.)

reduced prices or to designate the values of the articles advertised or the savings to be realized during such sale.

I think that it will be plainly seen that this plainly-ticketed price is in fact an imaginary price that the respondent would like to get, but the few instances in which he gets it shows that it is just a bargaining price more than the actual regular price of the garment.

Mr. Walley: I think that what the Government overlooks, at least with respect to the exhibit in connection with which this question was asked, is that the comparative price used in the exhibit is or is not fictitious, depending upon the establishment of the price at the time the ad is placed in the paper. In other words, if at the time this ad is put in the paper it is indicated that this fur was priced at so much money, if at that time that price was obtained by whatever process, it may be proper to establish it by this evidence.

But, there is evidence in the record that [78] these prices, the comparative prices contained in the newspaper ad were established by the respondent when the fur was first received by him from the wholesaler. He established three prices, it is true, one of them was this high comparative price.

When he placed the ad in the paper at some later date, as is indicated by the exhibit and the date, at that time he used as the comparative price, not a price which he then established in his mind,

(Testimony of Jacques DeGorter.)

but a price which he had placed upon the article when first received by him and placed in stock. I think in view of that testimony, with respect to the advertisement at least, if not the tickets themselves, you cannot use the selling price as establishing a fictitious price. That is a point the Government overlooks.

Hearing Examiner Lipscomb: I don't care to have any more argument on the question, please, gentlemen.

The weakness of respondent's position is that the objection is based upon irrelevancy. You may have a good theory, but for the present purposes the Hearing Examiner would like to get all the facts that may be relevant. He doesn't want to make any nice close rules on relevancy. Therefore, the objection is overruled and counsel may proceed with his examination. [79]

* * *

Q. May I ask you one question that might clear this up, Mr. DeGorter? In placing this ad, Commission's Exhibit 12 for identification, in placing that ad in the newspaper and placing the values on these various garments that you have listed here, did you at that time take into consideration whether or not you had sold these garments at the purported value figure?

A. I did not, I just took the garments off of the bin and made a group ready for sale.

Q. It did not make any difference to you

(Testimony of Jacques DeGorter.)

whether you had sold them for this value price or not? A. No.

Q. I see.

A. I might have sold them, though.

Q. Some of them you might have, and some of them you might not have?

A. I didn't put any emphasis on it.

Q. You didn't check to ascertain that?

A. No. [80]

Q. Now, do your records disclose to whom you sold at the figure two eighty-eight this mink clutch cape or stole?

A. Natural mink clutch sold for \$270.90, plus the tax.

Q. Would this be within the items that you had advertised in Commission's Exhibit 12 for identification, sir? A. Yes, sir.

Q. So this garment that you sold here for \$270 was purported by you to have a value of \$595, is that correct, sir?

A. Up to five ninety-five, sir.

Q. Up to five ninety-five?

A. Is five seventy satisfactory for you, sir?

Q. I beg your pardon.

A. Is five seventy satisfactory? Here you have the number, number of the garment is 17552—177552; here is the price, five seventy-five; here is the name of the manufacturer.

Q. That was your plainly-ticketed price, five seventy? A. Yes, sir.

(Testimony of Jacques DeGorter.)

Q. Just to check one more of these items, if we may, Mr. DeGorter. A. Yes, sir.

Q. On Commission's Exhibit No. 13 for identification there appears, "Precious mink jackets and coats values up to \$3,500, now \$1,488." Can we see the papers on that?

A. I didn't sell them, sir, as far as I could find last night I must not have sold them, neither for the high nor for [81] the low. I didn't find any, I couldn't find \$1,400, those are still for sale.

Q. How about the deep mink capes, jackets and stoles valued up to nine seventy-five, now four eighty-eight?

A. I think I can help you on that, sir. Seven ninety-five, eight ninety-five, seven fifty. We only had two prices, seven ninety-five, eight ninety-five, and here is the original memo we had, seven ninety-five, eight ninety-five. This was written by the bookkeeper I had at that time, this I wrote myself.

Q. Now, just for the record, on your purchase memo, what was the plainly-ticketed price that was noted? A. Eight ninety-five, sir.

Q. Eight ninety-five was the plainly-ticketed price? A. Yes, sir.

Q. And that was represented as having a value up to nine seventy-five, now four eighty-eight, that is correct, is it not? A. Yes, sir.

Q. And then you had only one coded price on that garment? A. It seems.

Q. Below the eight ninety-five?

(Testimony of Jacques DeGorter.)

A. It seems I had only one coded price.

Q. Yes.

A. That was sold for the advertised price.

Q. And that particular garment was shipped by you to Ohio, is [82] that correct, sir?

A. Correct, sir.

Q. And sold here in Los Angeles?

A. Yes, sir. I want you to know it was in another year than you originally made out your state of proof——

* * *

Q. Mr. DeGorter, I hand you what has been marked for identification as Commission's Exhibit 14, being a page from the Los Angeles Examiner, dated May 17, 1953. There appears on this exhibit a Pelta Furs ad, is that your ad, sir?

A. Yes, sir. [83]

Q. This ad states, "Complete stock now on sale, half price, present unchanged price tags remain on garments, you may deduct one-half."

Were you selling all of your merchandise at that time at one-half of your plainly-ticketed price?

A. No, sir, it was indicated exactly in numbers how many and what was sold. It says here 25 beautiful coats and jackets and the type of fur, it says here how many stoles, capes, and the different types, 150 stoles and so on, the different types.

Q. The merchandise that was on sale at one-half of the plainly-ticketed price, did that have an inventory of \$250,000, sir?

A. Certainly.

Q. It did?

(Testimony of Jacques DeGorter.)

A. It did. Mr. Anderson checked it.

Q. Now, that was merchandise that was on sale at one-half of the plainly-ticketed price, not any of the coded prices?

A. No, no. [84]

* * *

Q. Mr. DeGorter, I hand you what has been marked for identification as Commission's Exhibit No. 15, which appears to be a portion of a page from the Los Angeles Examiner, dated November 22, 1953, in which there appears an ad by Pelta Furs, is that one of your ads, sir?

A. Yes, sir.

Q. I will call your attention to that portion of this ad which says, "All advance 1954 styles, holiday gift furs now at cost and below cost." What merchandise were you selling at cost and below, were you selling all of your coats, all of your fur products?

A. All gift furs, sir. There was a group of collars, muffs, muff bags, and small capelets that we had as an introductory offer at cost or below cost.

Q. Were you selling all that you had in that type of garment at cost or below cost, or were you selling only a certain number of them?

A. Originally all. Then Mr. Anderson asked us after he had inspected, to change the ad in a group, which we did, following it up, it says a group of 1954 styled holiday gifts. But [85] originally we started off, but he thought it was better if we put on a group, which we did in the next ad.

(Testimony of Jacques DeGorter.)

Q. But at any rate this included only those small fur items and not capes, stoles, and coats?

A. Sure, some capes and capelets and some merchandise that we really wanted to close out in a pre-holiday sale.

* * *

Q. I hand you what has been marked for identification as Commission's Exhibit 16, which appears to be a portion of a page from the Los Angeles Times, dated September 26, 1954. Mr. DeGorter, there appears thereon an ad by Pelta Furs, is that one of your ads? A. Yes, sir.

Q. Now, this ad says, "Pelta's sale of mink, manufacturers' [86] financial sacrifice, many at cost, many below cost, many marked regardless of cost." Were you selling only a portion of your mink stock at these prices, sir?

A. I don't know, I couldn't answer that question, because it says, "Many at cost, many below cost, and many marked regardless of cost." That means there is a small—since the ad only advertises up to \$388, I don't think it included the whole inventory.

Q. You would have some capes and stoles, mink capes and stoles which would sell for more than \$388, would you not?

A. Sure, we would still have that one for \$3,000.

Q. That's right.

A. Which we didn't sell.

Q. Now, what is meant by this, "Manufacturers' financial sacrifice," Mr. DeGorter?

(Testimony of Jacques DeGorter.)

A. At that time I had—that was in 1954, yes—I had some consignment merchandise from a manufacturer who told me, “I would like to participate in your promotion, and I will quote you prices that are considerably below cost,” below his cost, in order to raise some money, so we worked the sale, that is done very often. [87]

* * *

Q. I hand you Commission’s Exhibit 21-A, Mr. DeGorter, and ask you what that is, sir?

A. That is an invoice of Cutler & Sons, New York.

Q. And what is the item number of that?

A. 16337.

Q. And what was the purchase price of it, sir?

A. \$150.

Q. And what were the coded prices on that, sir?

A. Two ninety-eight, three seventy-five. There was only one coded price—pardon me—only one coded price, two ninety-eight.

Q. Two ninety-eight, and what is the date of that invoice? A. September 24, 1953.

Q. I will hand you Commission’s Exhibit 21-B for identification, and ask you if that is your sales slip covering that item? A. Yes, sir.

Q. And how much was that sold for, sir?

A. \$303. [107]

Q. That is including the tax?

A. Including the tax.

Q. And when was it sold, sir?

(Testimony of Jacques DeGorter.)

A. It was sold October the 2nd, 1953.

* * *

Q. I hand you Commission's Exhibit 22-A for identification, Mr. DeGorter, and ask you what that is, sir?

A. That is an invoice of Birnbaum & Willner.

Q. And does that carry Item No. 16226?

A. Yes, sir.

Q. And what was the purchase price of that item? A. Sixty-nine fifty.

Q. And what were the three coded prices for that item? A. Two coded prices. [108]

Q. The two coded prices and the plainly-ticketed price?

A. One fifty-nine, one ninety-eight, two forty-nine.

Q. The two forty-nine was the plainly-ticketed price?

A. Including the tax, including 20 per cent tax.

Q. I hand you Commission's Exhibit 22-B for identification, and ask you if that is the sales slip for Item 16226? A. Yes, sir.

Q. And what date was that sold, sir?

A. September 29, 1953.

Q. And for how much was it sold, sir?

A. For \$159, \$163.77, including tax.

Q. Including tax. Now, you mentioned that your two forty-nine plainly-ticketed price included tax, sir? A. Yes, sir. [109]

* * *

(Testimony of Jacques DeGorter.)

Q. I hand you Commission's Exhibit 24 for identification, Mr. DeGorter, and ask you if that contains—and ask you what it is, sir?

A. Invoice of L & L Furs, New York, from November the 5th, 1953.

Q. That was to Pelta Furs?

A. That is to Pelta Furs.

Q. Does that contain Item 16458, sir?

A. 16458, yes, sir.

Q. And what did that item cost you, sir?

A. Forty-nine fifty, sir.

Q. And what were your three prices on that, sir?

A. Ninety-eight, one forty-eight, one ninety-eight.

Q. And you don't know what it was sold for?

A. No, sir. [111]

* * *

Q. Mr. DeGorter, we have had your testimony here regarding your method of placing two coded and one plainly-ticketed price on your fur products. How long do you keep the item in stock before you will sell it at one of the lesser or so-called coded prices?

A. That is very difficult, sir. There is no set time for it.

Q. No set time?

A. If we get it just before the end of the month, before the month-end sale, we might the next day already offer it for less, and two days later come

(Testimony of Jacques DeGorter.)

back to our original price. If we get it and find that our competitors are selling it for less, like I explained to you before, we might right away instruct the sales help to sell it for less, until such time that we have no competition any more with it, no price competition.

Q. Now, we will use a hypothetical situation, assuming that on the 14th of the month you get in a fur product and you put your three prices on there and you hang it up on your rack and immediately thereafter someone comes in and will not buy it at the higher price, but says, "I would buy it at another price," which happened to be one of your coded prices, would you sell it to him?

A. Certainly.

Q. At any time you can sell one at the coded price you will, [113] is that correct?

A. When they make us an offer, sir, and show money, then we talk very nicely and sell it.

Q. That is what you are in business for?

A. Yes, sir, a merchant, sir.

Q. Now, another question. Yesterday, I believe you said that when you run the ads in the newspapers showing a sale, that you never change the ticketed price of the sale merchandise, is that correct?

A. I wouldn't say never. As a rule I don't, but some items that I don't expect ever to sell for the printed price, I change the ticket.

Q. Well, now, we will use another hypothetical situation. You have an item that you have adver-

(Testimony of Jacques DeGorter.)

tised in the paper as a two ninety-five value, four hundred dollars and fifty cents, and now you have a garment with a plainly-ticketed price of \$295, is that correct?

A. Well, this case is not correct because we never advertise one particular item, we always advertise a group.

Q. Yes. Well, you have a group that range——

A. One item in that group, you mean?

Q. Yes.

A. We have an item in that group that is priced how much?

Q. Two ninety-five.

A. Two ninety-five. [114]

Q. And in your paper it says \$150?

A. Yes, sir.

Q. Well, now, when the customer comes in as a result of seeing that ad to purchase that coat, how does she know which one it is, sir?

A. The ticket shows her that was \$295, and she can get it now for \$149.

Q. If she tells you she has seen the ad, if she wants the \$149 coat?

A. We show her the one that has 298 on the ticket, the tag described in the ad and available at a price for 149.

Q. Well, now, what happens in a situation where the customer comes in and looks at that same garment but she has not seen your ad, do you attempt to obtain the 295 price for it at first?

A. We have never a particular garment up for

(Testimony of Jacques DeGorter.)

the ad. We give some of our inventory for that price and some we expect to get the higher price for it. If the customer comes in and wants to see a ranch mink stole around \$295, we are not going to tell her, "Well, I was thinking yesterday about giving this for less." We just tell her this is the garment, \$298. If, after she says, "I saw you had some in the paper reduced from 298 to 149," then I show her a similar garment which is priced \$298, and I say, "O.K., this one is one that we meant to sell for \$149 in the ad." [115]

Mr. Downs: I see. Mark this for identification as Commission's Exhibit 26, please.

(The paper referred to was marked Commission's Exhibit 26 for identification.)

Q. (By Mr. Downs): Mr. DeGorter, I hand you Commission's Exhibit 26 for identification and ask you if that is a photograph of your store front, sir?

A. Yes, sir, that is correct.

Q. And there appears therein a sign, "Special Mink Values, Discount Prices," is that correct?

A. That is correct, that is put after the complaint was sent to me.

Q. What are these discount prices referred to in your window ad there?

A. I should answer this question, counsel?

Mr. Walley: Go ahead and answer it.

Hearing Examiner Lipscomb: Answer the question.

(Testimony of Jacques DeGorter.)

A. Yes. Well, that is a price with a seasonal discount from the regular value.

Q. (By Mr. Downs): Seasonal reduction, discount is a reduction; you mean by that that you are selling instead of for the plainly-ticketed price, from one of the coded prices?

A. For summer sale reductions, yes, sir. [116]

* * *

Cross-Examination

By Mr. Walley:

Q. Mr. DeGorter, who has the job of determining what retail sales price shall be put upon any fur products which are received by Pelta Furs from manufacturers to wholesalers and put on your shelves for sale? A. I have.

Q. Do you have any policy which you use in determining what the retail sales price of any fur products which you receive in your place of business shall be offered to the public at?

A. I do.

Q. Will you explain that policy in arriving at the retail sales price?

A. In arriving at a retail sales price for any fur product, [117] fur garment, I first give it a physical inspection and determine what the public would be willing to pay for it, the public in general would be willing to pay for a garment of that special make and appearance. Then I compare that price that I have then set in my mind with the

(Testimony of Jacques DeGorter.)

cost price of the item. If that price is higher than a standard which I once worked out, for general purposes, I will price that as such. If it is not, I will keep to my standard practice, which is three times the cost price of the garment, including tax, and taking into consideration the guarantee we give, the service we have to give; some garments are more serviceable, we give a little higher markup, some garments don't wear so badly, we know we won't have any trouble with, we reduce the markup a little bit.

Q. Are there any variations in this three-time markup policy which you have?

A. There are.

Q. Will you explain some of the variations, some of the things which determine that you shall not use your three-time markup?

A. For very slow-moving items and also for items that I think I have a first on, a first means I am ahead of my competitor, have a good novelty, a good style, I might try to get more. Other items that I just don't want to carry too long in stock because of fashion reasons, I can mark that price a [118] little less. It is all a personal appreciation. Sometimes merchandise is bought in a group at the same price.

As an example, we buy squirrel belly garments in beige and in gray. Now, the grays fade very fast, even in stock, so we have to make a bigger profit on the beige, because we might have to lose money on the grays after they fade. There aren't two fur

(Testimony of Jacques DeGorter.)

animals alike that cost the same, one doesn't look half as nice as the other, and chances are that I will never get a normal markup on that one, so the good ones in the lot I will price a little higher.

Q. Now, in determining this three-time markup with its variations, do you take into consideration, then, the fact that you may not obtain the same three-time markup on all of the furs in a particular group of furs which you have purchased at a given time? A. I do.

Q. Now, when you determine that price, this price at which you will sell each one of these furs at retail, do you indicate on any of your records this particular price?

A. Since the end of 1953 we made it a habit to put that particular price on the bill on which that garment was invoiced to us.

Q. And that price is also put on a sales ticket which is attached to the garment, is that correct?

A. Yes, sir. [119]

Q. Now, do you anticipate—I believe you testified that you anticipated that you may not be able to get that price which is put on the invoice and on the sales ticket, which is visible to the public, for all of the garments that might have come in one group. Do you then arrange to determine a lower price at which you will sell any one of those fur products depending upon changed circumstances? A. I do.

Q. And you determine that price scale, do you not? A. Yes, sir.

(Testimony of Jacques DeGorter.)

Q. Do you indicate on any of your records what this lower price will be at which you will sell a given fur, depending upon changed conditions and circumstances? A. Yes, sir.

Q. On what record of yours?

A. On the sale invoice on which the garment was billed to us at the time we received it.

Q. And that is also put on the sales ticket?

A. Also put in code on the sales ticket.

Q. You are familiar with the method of selling furs in your place of business? A. Yes, sir.

Q. You engage in sales, do you not?

A. I do sometimes.

Q. All right. Have you also instructed your employees in [120] sales tactics? A. Yes, sir.

Q. Then you are familiar with the method by which they undertake to sell a fur?

A. Yes, sir.

Q. When you exhibit a fur garment to a customer, it is taken out of the rack?

A. Yes, sir.

Q. There is attached to that fur garment a sales ticket, is there not? A. Yes, sir.

Q. The customer wants to know what the price of the garment is; what price is indicated to the customer?

A. We show the ticket, she reads it. We will tell——

Q. Is she also told?

A. As a rule she takes the ticket herself.

Q. I see, and in discussion about the price, is

(Testimony of Jacques DeGorter.)

it indicated to the customer that this is the price at which the garment will sell? A. Yes, sir.

Q. Now, you have indicated in your testimony that where you have a garment with a plainly-ticketed price and a coded price as well, which is lower than the plainly-ticketed one, that if a customer says to a sales person, "I will pay a price which is lower than the plainly-visible price," and the customer has [121] cash in hand, that you certainly will sell that garment at the lower coded price? A. Yes, sir.

Q. Did you mean when you made that statement that the moment the customer says, "I will pay you so much money for the garment, I have the money," do you immediately recede from the plainly-visible price on the garment?

A. No, sir.

Q. Do you continue to try to convince the customer that this garment is worth a price which is indicated plainly as marked? A. Yes, sir.

Q. Isn't it a fact that it is only after you or your sales people are pretty well convinced that the customer will not pay the plainly-visible price that you recede from that price? A. Yes, sir.

Q. So that the manner in which you testified was no inference as to the rapidity with which you change the price of the garment?

A. Certainly not. May I add something to the method?

Q. You may discuss with me if you have something.

(Testimony of Jacques DeGorter.)

A. Well, no, go ahead, we won't take time.

Q. Now, Mr. DeGorter, about how many fur units, by units, I mean separate fur products, do you have in your place of business on the average, every month through the year, about how many separate units are there? [122]

A. I would say in the off season about 750, in the season, an average of around close to a thousand.

Q. That is an approximation?

A. Yes, sir.

Q. And you have approximately that many separate fur units at any given month?

A. Every one of them labeled.

Q. Do you have any recollection now, Mr. DeGorter, how many separate sales were made by Pelta Furs of fur products, fur units in the year 1953?

A. The year '53 we made 2,547 sales.

Q. 2,547. Would you have any recollection presently how many sales were made by Pelta Furs of separate fur units in December of 1953?

A. 367.

Q. And will you testify, if you have recollection, as to how many fur units were sold by Pelta Furs in November, '53?

A. 274.

Q. And can you give the sales for October of '53?

A. 255.

Q. And for the month of September, 1953?

A. 167.

Q. Now, according to testimony given here,

(Testimony of Jacques DeGorter.)

there were four sales made by Pelta Furs in the month of December, 1953, which furs were shipped out of the State of California, is that [123] correct? A. Yes, sir.

Q. Were there any others in that month that were shipped out of the State of California?

A. I don't know, sir.

Q. There was evidence that one fur product was shipped by Pelta Furs out of the State in November of 1953. Do you have any recollection that there were any others?

A. Mr. Anderson checked. I have no recollection.

Q. At the time this evidence was obtained that was adduced here, Mr. Anderson was in your place of business? A. Yes, sir.

Q. And how much time did he spend there in checking your inventory and your records?

A. Days and days, many days.

Q. Approximately? A. Many days.

Q. Did he go over every garment which you had in your place of business at that time?

A. He did.

Q. Checked all the invoices against those garments?

A. Yes, sir. We gave him all the invoices.

Q. Now, Mr. DeGorter, when you sell to the customer in your place of business, does the customer tell you at the outset when she is talking about a particular fur that she lives in [124] any particular State? A. No, sir.

(Testimony of Jacques DeGorter.)

Q. When does she generally, if she does, tell you that she is not from California?

A. After the sale is consummated.

Q. That is at the time when question of delivery arises? A. Yes.

Q. And as a rule these furs have to be altered in some way?

A. Some little alterations made, labels put on.

Q. Would you say in most cases that delivery cannot be had in the same day?

A. In most cases not the same day.

Q. And when the question of delivery comes up, is it then indicated by the customer that she does not live in California, if that be the fact?

A. If that would be the fact, it is indicated so.

Q. Then do you have discussion with her as to how you will make delivery of the fur?

A. Well, she will tell us how she wants it, air express, railway, whatsoever.

Q. In other words, in some instances she will indicate, "Well, you have them ship the fur to me, I won't be here to take delivery"? A. Yes.

Q. That is the first time that you understand from the [125] customer that the fur is not to be delivered here in California but is to be delivered elsewhere? A. Yes, sir.

Q. Mr. DeGorter, you do go back East, do you not, on a purchasing trip from time to time?

A. Yes, sir.

Q. When you go back there, do you ship the

(Testimony of Jacques DeGorter.)

furs which you purchase into the State of California yourself, do you make the arrangements?

A. No, sir.

Q. Who makes the arrangements to ship whatever furs you buy?

A. The manufacturer I buy them from.

Q. Have you ever during the time charged in the complaint here since 1952 purchased any furs from outside the United States?

A. No, sir.

Q. You have never imported any furs?

A. No, sir.

Q. From any foreign country?

A. No, sir.

Q. Now, Mr. DeGorter, when you place an advertisement in any one of the newspapers relative to a sale that Pelta Furs may be engaging in, when you indicate in that advertisement that the price at which you are selling a given group of furs is lower than a price at which you may have sold them [126] previously, from what source do you obtain this higher price which you indicate as being the value or a price at which you may have sold the fur at one time; what is the source of that price?

A. The price ticket.

Q. The price ticket which you have in your records?

A. Which I have compiled from my invoice.

Q. In other words, the time you place the ad in the paper you do not at that moment in your own mind evolve a price which is used as comparative pricing advertisement?

A. Definitely not.

(Testimony of Jacques DeGorter.)

Q. You go to your records? A. Yes, sir.

Q. And you obtain the price. Have you ever had occasion in the operation of your business where you have advertised furs for sale at a lower price than an indicated value or price at which you have previously sold, which advertisement is placed in the paper about the time you received a shipment of furs which you are advertising at reduced prices? I am talking about time element now.

A. I might have, I don't know for sure, but I might have. After I found out that a day or two after I received the merchandise, competitors were promoting a certain item for less than I originally priced it.

Q. Would it be true in those cases, Mr. DeGorter, that you [127] had already planned a sales ad and that you had prepared the ad or had the newspaper prepare it, you discovered that a group of furs which you just recently purchased was being offered for sale by some competitor?

A. Yes, sir.

Q. And would you then in that ad cover that situation by indicating a reduced sales price for these furs just received? A. I would.

Q. That is possible?

A. That is possible. I want to say this, I want you to take into consideration that it takes about three to four weeks to prepare an ad in the Sunday edition. The ad has to be in, is printed four days ahead and has to be in eight days ahead.

(Testimony of Jacques DeGorter.)

Q. Have you ever purchased, Mr. DeGorter, a group of furs with the intention of advertising them for sale as soon as the ad can be made at a reduced price? A. No, sir.

Q. Now, Mr. DeGorter, assuming that you had sold all of your inventory in a given year at the plainly-visible price, which you have attached to each of the fur units, could you give us some idea what your percentage of net profit would be on your investment?

Mr. Downs: I believe I will object to that, Mr. Examiner, it is too conjectural, he hasn't sold them all at the fully-ticketed price, and I don't think that it has any [128] materiality.

Hearing Examiner Lipscomb: Read me the question, please, Mr. Reporter.

(Question read.)

Mr. Walley: It is easily ascertainable, if the Court please.

Hearing Examiner Lipscomb: I think the question is harmless, he may answer it.

A. The profit would be 13 per cent.

Q. (By Mr. Walley): Mr. DeGorter, do you happen to have with you any evidence of any sales made by you of advertised furs or fur units which were sold at the higher comparative price indicated in your advertisement, do you happen to have any? A. Yes, sir.

Q. Will you please refer to them? I don't mean to confine you to any given year, Mr. DeGorter, if you have any in '53 or '54.

(Testimony of Jacques DeGorter.)

A. Here I have a list, about 58 of them from all of which I sold, about 50 advertised items which I sold at the higher comparative price, so-called comparative value.

Q. You have 50 items in this list?

A. Let me see, 60 items.

Q. Well, I don't know whether you understand my question.

A. Yes, these items are all sold at the higher comparative [129] price. Where it says mink cape value nine seventy-five, now four ninety-five, these have been sold for nine seventy-five.

Q. What period of time does this cover?

A. This is in 1953, before the going-out-of-business sale.

Q. And these were all furs that had been advertised by you in the newspaper as being on sale at a price lower than your regularly-listed price?

A. Later on, yes, sir.

Q. And that many had been sold by you at the higher comparative price indicated in the advertisement?

A. Yes, sir. More have been sold, but they don't reflect the ads, we sold plenty more at the higher price, but these are the ones that reflect the ads.

Q. The groups that had been advertised in the particular ad? A. Yes, sir.

Q. Mr. DeGorter, when you instruct your sales people in the sale of fur units, do you tell them under what conditions or circumstances that they

(Testimony of Jacques DeGorter.)

can recede from the regularly-listed price on the sales ticket? A. Yes, sir.

Q. Do they ever sell anything at a price less than the regular listed price except upon instructions from you that they may sell at one of the coded prices? A. From me or the manager.

Q. From you or the manager. [130]

A. They have for good form, to ask the manager if they could move it, do some better with a certain item, because the customer in is not in a position to spend that much, her husband is a Federal employee or any other reason.

Q. Then, as I understand your testimony, sales people must try to sell at the regularly-listed price unless they have authority from yourself or your sales manager to sell at one of the coded prices?

A. Yes, sir.

Q. Mr. Murray is presently the sales manager?

A. Yes, sir.

Mr. Walley: I have no further questions.

Redirect Examination

By Mr. Downs:

Q. Mr. DeGorter, you have stated here that if you sold all of your items at the plainly-ticketed price your next profit would be a 13 per cent return on your investment, is that what I understood you to say? A. Yes, sir.

Q. How is that arrived at, sir; how do you arrive at that 13 per cent figure?

(Testimony of Jacques DeGorter.)

A. We took an average of three years before the going-out-of-business sale. The amount of business we did during these three years was between 220 and 250 thousand dollars a year. The general overhead expenses without any salary was [131] between 115 and 135 thousand dollars. If everything would have been sold for three times the cost, with the exception of higher minks, that are never marked up three times the cost, I am talking now of merchandise that costs more than a thousand dollars cost price, the net profit before depreciation of inventory would have been about 16 to 17 per cent, which you can figure out easily. If you cut each figure 235 thousand, less 135, 140 thousand expenses, since in these years we always have ended up with an inventory of between 35 and 50 thousand dollars, and it is a habit in the fur industry after the season is over to depreciate what is left of the inventory by 25 per cent, you come to the figure of 13 per cent.

That was made by my auditor, and he explained it to me.

Q. And this 13 per cent net profit, you are just repeating what your auditor told you?

A. No, I looked into these figures, it is not hearsay, I was sitting together with him, and I checked it. I even got figures if we would sell everything for the middle price, if we would sell everything for the low we would end up losing 8 per cent. If we would sell everything for the middle price we would end up with 4 per cent. If we would average,

(Testimony of Jacques DeGorter.)

make just as many sales at the high and the middle and the low, then we would end up with around 3 per cent, and that is about the case.

Q. That is about what you do? [132]

A. We sell, just, I think, half and half. We made a little bit more than 3 per cent, maybe probably 5 or 6 per cent lately, but the years before the complaint were the first basic years, we didn't have any full years to talk about. During the complaint we had to go back of the going-out-of-business sale, which disrupted the picture, after that we only had a fiscal year of five months because we broke up the partnership and then we had a new year of seven months again, so we took the three years before that period and that proves to us that based on that, I would say more than 50 per cent of the sales have been made at the printed price, at the price quoted to the customer.

Mr. Downs: That is all.

Mr. Walley: Nothing further.

Hearing Examiner Lipscomb: Do you rest?

Mr. Downs: I have no further evidence.

Hearing Examiner Lipscomb: And you rest respondent's defense?

Mr. Walley: Yes, respondent rests. [133]

* * *

COMMISSIONER'S EXHIBIT No. 12

discount sale

Tremendous Inventory

1000 Selected Furs

Priced Regardless of Cost!

Convenient LayAway Plan

Charge Accounts Invited

fine stoles and clutch capes

Values up to \$198 Now \$ 68

capes, jackets and spencers

Values up to \$250 Now \$ 98

stoles, capes and coats

Values up to \$350 Now \$ 128

mink clutches, stoles and capes

Values up to \$595 Now \$ 288

jackets, capes, stoles and coats

Values up to \$750 Now \$ 388

mink capes, jackets and stoles

Values to \$975 Now \$ 488

precious mink jackets and coats

Values up to \$3500 Now \$1488

Open 'til 9 p.m. Mondays

Michigan 7727

pelta furs

437 W. Seventh (cor. Olive)

Fur Products labeled to show country of origin of
imported furs

COMMISSIONER'S EXHIBIT No. 13

discount sale

Tremendous Inventory of Selected Furs

Priced Regardless of Cost!

Convenient Lay Away Plan

Charge Accounts Invited

fine deep stoles and clutch capes

Values up to \$250 Now \$ 88

newest capes, jackets and coats

Values up to \$350 Now \$ 128

stoles, capes and spencers

Values up to \$450 Now \$ 188

mink clutches, stoles and capes

Values up to \$595 Now \$ 288

jackets, capes, stoles and coats

Values up to \$750 Now \$ 388

deep mink capes, jackets and stoles

Values up to \$975 Now \$ 488

precious mink jackets and coats

Values up to \$3500 Now \$1488

Open 'til 9 p.m. Mondays

Michigan 7727

pelta furs

437 W. Seventh (cor. Olive)

Fur Products labeled to show country of origin of
imported furs

COMMISSIONER'S EXHIBIT No. 14

Pelta Furs consolidates with famous
wholesale mink manufacturer.

more room required!

complete stock \$250,000.00 exquisite styles
now on Sale 1/2 price

present unchanged price tags remain on garment

You May Deduct One-Half!!!

Pelta Furs

437 W. 7th St., Los Angeles
Michigan 7727

The Fur Corner - 7th & Olive

25 Beautifully Styled Genuine Mink Coats and
Jackets—Ranch, Wild, Pastel and Silverblu—
Priced at \$1650*, \$1950*, \$2950*, and up to
\$5000*. Now Just Half of Ticket Price.

250 Genuine Mink Stoles and Capes—Ranch, Wild,
Silverblu, Sapphire, Breath of Spring and
White—Priced at \$198*, \$298*, \$398*, \$475*,
\$575*, \$750* and up to \$1950*. Now Just Half
of Ticket Price.

fur products labeled to show country of
origin of imported furs

*Subject to Tax

150 Stroller and Full Length Coats—in Beaver,
Dyed Ermine, Dyed Muskrat, Dyed Persian
Lamb and many other types of fur—Priced at
\$249*, \$349*, \$475*, \$595*, up to \$1850*. Now
Just Half of Ticket Price.

350 Stoles, Capes, and Jackets—in Dyed China Mink, Dyed Ermine, Dyed Muskrat, Dyed Persian Lamb, Dyed Squirrel and practically every other type of fur—Priced at \$98*, \$149*, \$198*, \$298*, \$398*, \$475*, and up to \$950*. Now Just Half of Ticket Price.

convenient lay away plan
terms to suit your budget

Never Store Your Furs With Anyone From Whom
You Wouldn't Buy Them
For Complete Fur Service
Call - Pelta Furs - MI 7727
Lowest Summer Rates

COMMISSIONER'S EXHIBIT No. 15

After 38 Successful Years
Pelta Furs

Los Angeles' Largest Exclusive Furrier Quits!

All Advance 1954 Styles, Holiday Gift Furs Now
At Cost and Below Cost.

\$250,000.00 Inventory Sacrificed
Entire Fur Stock Must Go!
at a fraction of original prices!
Savings are Tremendous!

Liquidated * * * at only \$66

Stoles, Capes, Jackets and Coats in: Dyed Marmot, Dyed Grey Fox (White Squirrel), Grey Persian Lamb Paw, Black Dyed Opposum, Natural Lynx, Natural Raccoon, Blue Fox, Silver Fox, Dyed Squirrel Flank, Dyed Muskrat and a variety of other furs.

Coats, Capes, Jackets, Stoles, Scarfs up to \$5000.00 Now at Slashed Prices!

Liquidated at only \$99

Stoles, Capes, Jackets and Coats in:

Natural Blue Fox, Dyed Marmot, Dyed Squirrel Back, Dyed Muskrat, Dyed Mink, Silver Fox, Dyed Mouton Processed Lamb, Dyed Persian Lamb Paw, Black Dyed Caracul Kid and many others.

Liquidated at only \$144

Stoles, Capes, Jackets and Coats in:

Ranch Mink, Silver Blu Mink, Pastel Mink, Dyed Squirrel, Dyed China Mink, Sheared Beaver, Letout Dyed Marmot, Letout Dyed Muskrat, Black Dyed Persian Lamb, Dyed Squirrel Back (Dyed Brown and Black Caracul Lamb), Dyed Sheared Raccoon and many others.

Selected Fine Furs at Sacrifice Prices

Letout Ranch Mink Stoles.....	Now \$ 244
Natural Grey Squirrel Coats.....	Now \$ 299
Letout Silverblu Mink Stoles.....	Now \$ 333
Letout Wild Mink Stoles.....	Now \$ 388
Letout Deep Ranch Mink Stoles....	Now \$ 444
Long Sheared Beaver Coats.....	Now \$ 499
Letout Ranch Mink Capes.....	Now \$ 555
Chiffon Dyed Ermine Coats.....	Now \$ 599
Letout Natural Mink Jackets.....	Now \$ 666
Ranch Mink Coats.....	Now \$ 988
Wild Mink Coats.....	Now \$1160
Starlight Mink Coats.....	Now \$1498
Silverblu Mink Coats.....	Now \$1999

Plus Tax—Fur Products Labeled to Show Country
of Imported Furs.

Layaway or Time Plan if Desired

Pelta Furs

Corner 7th and Olive,

437 W. Seventh St., Los Angeles

Open 'til 9 p.m. Mondays & Fridays

COMMISSIONER'S EXHIBIT No. 16

pelta's sale of Mink

Manufacturer's Financial Sacrifice!

Many at Cost! Many Below Cost!

Many Marked Regardless of Cost!

mink stoles and capes \$188

Unbelievable values in Natural, Ranch and Pastel Mink. Suitable for any occasion. Luxurious, flattering new styles.

newest mink clutches, stoles and capes \$288

In Ranch, Wild, Pastel, Silver Blue and Breath of Spring Mink. Deep backs, exquisite workmanship.

mink spencer jackets, capes and stoles \$388

Styled to add loveliness to every costume, daytime or evening. Rich, Natural Mink in many mutations, harmoniously fashioned in a variety of new styles.

Convenient Layaway Plan
Charge Accounts Invited

Open 'til 9 p.m. Mondays

MIchigan 7727

pelta furs
437 W. Seventh (cor. Olive)

Fur Products labeled to show country of origin of
imported furs

[Endorsed]: No. 15184. Transcript of Record. In the United States Court of Appeals for the Ninth Circuit. Pelta Furs, Petitioner, vs. Federal Trade Commission, Respondent. On Petition for Review of an Order to Cease and Desist.

Filed August 13, 1956.

PAUL P. O'BRIEN,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 15184

Commission Docket No. 6297

JACQUES DE GORTER and SUZE C. DE GORTER,
as Individuals and as Co-Partners Trading
as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF ORDER
OF FEDERAL TRADE COMMISSION

To the Judges of the United States Court of Appeals
for the Ninth Circuit:

The petition of Jacques De Gorter and Suze C. De Gorter respectfully shows to the Court as follows:

Nature of the Proceedings

That on February 25, 1955, the respondent, Federal Trade Commission, issued its complaint being Docket No. 6297 against petitioners in which it charged that for several years prior thereto petitioners maintained a course of trade in commerce, among and between the various states of the United States, in that petitioners engaged in the purchase, sale and distribution of fur products which when sold by petitioners were transported by them from

their place of business in the State of California to purchasers thereof located in various places other than in the State of California.

The complaint further alleged that, subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, petitioners introduced, sold, advertised, offered for sale, transported and distributed fur products in commerce certain of which fur products were misbranded, falsely advertised, and falsely invoiced in violation of Section 3 (a) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder.

The complaint further alleged that, subsequent to the effective date of said Act, petitioners sold, advertised, offered for sale, transported and distributed fur products which were made in whole or in part of fur which had been shipped and received in commerce as "fur products" and "fur" are defined in the Fur Products Labeling Act, certain of which fur products were misbranded, falsely advertised, and falsely invoiced in violation of Section 3 (b) of said Act and of the Rules and Regulations promulgated thereunder.

The complaint then set forth specific acts of labeling, advertising and invoicing claimed to be false and deceptive under the provisions of Section 5 (a) of the Fur Products Labeling Act and Rule 44 of the Rules and Regulations promulgated thereunder, and the complaint then alleges that these violations of the Fur Act and its Rules constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

The complaint contained a notice directed to petitioners to appear and to show cause at a Hearing to be held before a Hearing Examiner of the Federal Trade Commission on the charges set forth in the complaint and to show cause why an order should not be made requiring petitioners to cease and desist committing the violations of law charged.

An Answer to the complaint was filed by petitioners in which they denied that they were engaged in interstate commerce although admitting that in a few isolated instances fur products sold in their place of business to purchasers present therein were at the request of the purchasers shipped to an address outside of the State of California.

Petitioners further denied in their Answer that they committed the acts complained of in the complaint, and more particularly, denied that they used fictitious prices as comparative prices, or in advertising reductions and savings in the sale of fur products, and petitioners alleged in their Answer that the word "fictitious" which appeared in Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission, was improperly and incorrectly defined and construed in the complaint by the attorney who had prepared the complaint.

A hearing on the issues made out by said complaint and answer was had on July 5th and 6th, 1955, at Los Angeles, California, before the Honorable Abner E. Lipscomb, Hearing Examiner, and after the hearing, the matter was taken under submission by said Hearing Examiner.

That thereafter and before said Hearing Exam-

iner made his Initial Decision, petitioners filed Proposed Findings of Fact, Conclusions of Law and a Proposed Order which were adopted in part and rejected in part by the Hearing Examiner.

The Hearing Examiner made and filed his Initial Decision with the Federal Trade Commission on November 18, 1955, a copy of which was served by the Commission on the petitioners by registered mail on December 5, 1955. The Hearing Examiner in his Initial Decision, found that petitioners committed all of the acts complained of in the complaint and concluded that such acts, except those in violation of Rule 44 of the Rules and Regulations, were violative of the Fur Products Labeling Act and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. Based upon these findings and conclusions, the Hearing Examiner made an Order, in his Initial Decision, that petitioners cease and desist from continuing said acts and conduct, other than those violative of Rule 44, in the sale, advertising, offering for sale, transportation or distribution of fur products in commerce, or in the sale of fur products made of furs shipped and received in commerce.

The Hearing Examiner, having found that petitioners committed the acts complained of in the complaint with respect to Rule 44 of the Rules and Regulations and concluding that such acts, while not violative of the Fur Products Labeling Act, did constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within

the intent and meaning of the Federal Trade Commission Act, made a further order that the petitioners cease and desist from continuing said acts and conduct in connection with the offering for sale, advertising and distribution of fur products in commerce.

Petitioners being dissatisfied with some of said Findings and Conclusions and with the second portion of the Cease and Desist Order made by the Hearing Examiner, and filed by him with the Federal Trade Commission, filed with the Federal Trade Commission on December 9, 1955, their Notice of Intention to Appeal from said Cease and Desist Order.

The attorney in support of the complaint, being dissatisfied with that portion of the Cease and Desist Order made by the Hearing Examiner which in effect held that Rule 44 of the Rules and Regulations was promulgated without authority under the Fur Products Labeling Act, filed his Notice of Appeal from that portion of the Cease and Desist Order.

Briefs were filed, by petitioners and by the attorney in support of the complaint for the Commission, in both Appeals, and on May 11, 1956, the respondent Commission made its Findings of Fact and Conclusions of Law and its Cease and Desist Order in which it ordered petitioners to Cease and Desist from committing the acts alleged in the complaint to be violative of the Fur Products Labeling Act and its Rules and Regulations, not only in connec-

advertised fur products for sale in interstate commerce but only that they advertised fur products for sale in locally published newspapers and that they made no sales in interstate commerce.

3. The Finding that petitioners stipulated that they are engaged in interstate commerce is neither supported by the evidence nor by the stipulation, that petitioners, in the course of their business, are in competition with other firms in commerce.

II.

That respondent Commission rejected petitioners' Proposed Findings of Fact and Conclusions of Law, particularly Findings numbered III, IV, V, XV, and XVII, which were supported by the evidence.

III.

That the Finding that petitioners violated the provisions of the Federal Trade Commission Act is immaterial and renders that portion of the Cease and Desist Order denominated C 2 (a), (b), (c), (d), and (e), and C 3, unsupported by the record.

A. Petitioners were not charged with violating the provisions of the Federal Trade Commission Act; they were charged with violating the provisions of the Fur Products Labeling Act and its Rules and Regulations which violations were alleged to be unfair and deceptive acts and practices and unfair methods of competition under the Federal Trade Commission Act, as is required to be alleged by Section 3 (a) and 3 (b) of the Fur Act, in

order to justify the issuance of a Cease and Desist Order.

B. Rule 44, Subdivisions (a) to (g), inclusive, was promulgated by the Federal Trade Commission in excess of the authority vested in it by the Congress by the provisions of Section 8 (b) of the Fur Products Labeling Act.

C. Objections to evidence of acts violative of this Rule, which were made by petitioners at the hearing, should have been sustained.

IV.

That the Findings of the respondent Commission that petitioners used "fictitious prices," in advertising comparative prices and reductions in price and savings to be effective, is not supported by the evidence.

V.

That the Findings of respondent Commission, that petitioners' advertised comparative prices and savings to be effected, were fictitious, is immaterial and renders that portion of the Cease and Desist Order relating thereto unsupported by the record; the definition of the word "fictitious" as used in the complaint, is not a definition contained in the Fur Products Labeling Act or in its Rules and Regulations or contemplated by the Act, but is a definition coined by the attorney preparing the complaint.

A. That objections, made by petitioners to ques-

tions relating to prices at which petitioners sold their fur products, should have been sustained.

Relief Prayed For

I.

That the Order of the respondent Commission be set aside in its entirety and that another and different Order be made dismissing the complaint; or

II.

That the Order of the Respondent Commission be modified by striking therefrom that portion of the Order denominated C (2) (a), (b), (c), (d), and (e), and C (3); or

III.

That the Order of the respondent Commission be modified by striking therefrom that portion denominated C (2) (a), (b), (c), (d), and (e) contained in the first half of the Order.

IV.

Such other and further relief as to the Court may seem just and proper.

WALLEY & DAVIS,

By /s/ J. J. WALLEY,

Attorneys for Petitioners.

[Endorsed]: Filed July 9, 1956.

[Title of Court of Appeals and Cause.]

APPELLANTS' STATEMENT OF POINTS

To the Clerk of the Above-Entitled Court:

The points on which appellants intend to rely in this court on this appeal are as follows:

1. That the evidence does not support the following Findings of Fact, the Conclusions of Law drawn thereon and the Order of the Federal Trade Commission;

(a) That appellants are engaged in the sale, in interstate commerce, of fur products;

(b) That appellants advertise, for sale in interstate commerce, fur products;

(c) That appellants transport or distribute in interstate commerce, fur products;

(d) That appellants stipulated that they are engaged in interstate commerce in the sale, distribution and transportation of fur products;

(e) That appellants are engaged in interstate commerce within the concept of interstate commerce as used in either the Fur Products Labeling Act or the Federal Trade Commission Act;

(f) That appellants used fictitious prices in advertising comparative prices; reductions in prices and savings to be effected;

2. That appellants are charged in the complaint only with violating provisions of the Fur Products Labeling Act.

3. That appellants are not charged in the com-

plaint with the commission of unfair and deceptive acts and practices and unfair methods of competition under the Federal Trade Commission Act but only under the Fur Products Labeling Act.

(a) No rules or regulations similar to Rule 44 and all of its subdivisions as promulgated under the Fur Products Labeling Act, were ever promulgated under the Federal Trade Commission Act.

4. That the portion of the Order of the Federal Trade Commission denominated C (2) (a), (b), (c), (d) and (e) and C (3) is contrary to law and based upon evidence objected to by appellants on the Show Cause hearing.

5. That that portion of the Order of the Federal Trade Commission denominated C (2) (a), (b) and (c) is contrary to law and based upon a definition of the word "fictitious" not contained within the Fur Products Labeling Act or intended by the Congress.

* * *

Dated: August 29, 1956.

WALLEY & DAVIS,

By /s/ J. J. WALLEY,

Attorneys for Appellants.

[Endorsed]: Filed August 31, 1956.

No. 15184.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PELTA FURS,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITIONER'S BRIEF ON REVIEW.

WALLEY & DAVIS,

By J. J. WALLEY,

408 South Spring Street,
Los Angeles 13, California,

Attorneys for Petitioner.

FILE

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PAUL P. O'BRIEN, C



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No. 15184.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES DE GORTER and SUZE C. DE GORTER, as individuals and as co-partners trading as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONER'S BRIEF ON REVIEW.

Statement Re Jurisdiction.

The complaint issued by the Federal Trade Commission charges petitioners with violations of the Fur Products Labeling Act, being Public Law 110 enacted by the 82nd Congress of the United States effective August 9, 1952. It is provided in said Act, in Section 8 thereof, that the Act shall be enforced by the Federal Trade Commission under rules, regulations and procedure provided for in the Federal Trade Commission Act and that the Commission shall prevent any person from violating the Fur Products Labeling Act with the same jurisdiction, powers and duties, as though all terms and provisions of the Commission Act were incorporated in the Fur Act.

It is provided in Section 5(b) of the Federal Trade Commission Act, being Public Law 203, enacted by the 63rd Congress of the United States, as amended, that whenever the Commission shall have reason to believe that any person is using any unfair method of competition or any deceptive act or practice in commerce, it shall issue and serve upon such person a complaint stating its charges and setting a date for a hearing thereon, and in proper cases shall make its order that said person cease and desist from committing such violations.

It is then provided in Section 5(b) of the Commission Act that the jurisdiction of the Circuit Court of Appeals of the United States (now the United States Court of Appeals), to affirm, enforce, modify or set aside Orders of the Commission, shall be exclusive.

Statement of the Case.

That on February 25, 1955, the respondent, Federal Trade Commission, issued its complaint being Docket No. 6297, against petitioners in which it charged that for several years prior thereto petitioners maintained a course of trade in commerce, among and between the various states of the United States, in that petitioners engaged in the purchase, sale and distribution of fur products which when sold by petitioners were transported by them from their place of business in the State of California to purchasers thereof located in various places other than in the State of California. [Trans. p. 3.]

The complaint further alleged that, subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, petitioners introduced, sold, advertised, offered for sale, transported and distributed fur products, in commerce, certain of which fur products were misbranded,

falsely advertised, and falsely invoiced in violation of Section 3(a) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder. [Trans. p. 4.]

The complaint further alleged that, subsequent to the effective date of said Act, petitioners sold, advertised, offered for sale, transported and distributed *fur products* which were made in whole or in part of "*fur*" *which had been shipped and received in commerce*, as "*fur products*" and "*fur*" are defined in the Fur Products Labeling Act, certain of which fur products were misbranded, falsely advertised, and falsely invoiced in violation of Section 3(b) of said Act and of the Rules and Regulations promulgated thereunder. [Trans. p. 4.]

The complaint then set forth specific acts of labeling, advertising and invoicing claimed to be false and deceptive under the provisions of Section 5(a) of the Fur Products Labeling Act and Rule 44 of the Rules and Regulations promulgated thereunder, and the complaint then alleged that these violations of the Fur Act and its Rules constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act. [Trans. p. 11.]

The complaint contained a notice directed to petitioners to appear and to show cause at a Hearing to be held before a Hearing Examiner of the Federal Trade Commission on the charges set forth in the complaint and to show cause why an order should not be made requiring petitioners to cease and desist committing the violations of law charged. [Trans. p. 17.]

An answer to the complaint was filed by petitioners in which they denied that they were engaged in interstate commerce although admitting that in a few isolated in-

stances fur products sold in their place of business to purchasers present therein were at the request of the purchasers shipped to an address outside of the State of California. [Trans. pp. 25, 36.]

Petitioners further denied in their answer that they committed the acts complained of in the complaint, and more particularly, denied that they used "fictitious" prices as comparative prices or in advertising reductions and savings in the sale of fur products, and petitioners alleged in their answer that the word "fictitious" which appeared in Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission, was improperly and incorrectly defined and construed in the complaint by the attorney who had prepared the complaint. [Tr. pp. 26-29.]

A hearing on the issues made out by said complaint and answer was had on July 5th and 6th, 1955, at Los Angeles, California, before the Honorable Abner E. Lipscomb, Hearing Examiner, and after the hearing, the matter was taken under submission by said Hearing Examiner.

That thereafter and before said Hearing Examiner made his Initial Decision, petitioners filed Proposed Findings of Fact, Conclusions of Law and a Proposed Order which were adopted in part and rejected in part by the Hearing Examiner.

The Hearing Examiner made and filed his Initial Decision with the Federal Trade Commission on November 18, 1955, a copy of which was served by the Commission on the petitioners by registered mail on December 5, 1955. The Hearing Examiner in his Initial Decision, found that petitioners committed all of the acts complained of in the complaint and concluded that such acts, except

those in violation of Rule 44 of the Rules and Regulations, were violative of the Fur Products Labeling Act and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. Based upon these findings and conclusion, the Hearing Examiner made an Order, in his Initial Decision, that petitioners cease and desist from continuing said acts and conduct, other than those in violation of Rule 44, in the sale, advertising, offering for sale, transportation or distribution of fur products in commerce, or in the sale of "fur products" made of "furs" shipped and received in commerce.

The Hearing Examiner, having found that petitioners committed the acts complained of in the complaint with respect to Rule 44 of the Rules and Regulations and concluding that such acts, while not violative of the Fur Products Labeling Act, did constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act, made a further order that the petitioners cease and desist from continuing said acts and conduct in connection with the offering for sale, advertising and distributing of fur products in commerce.

Petitioners, being dissatisfied with some of said Findings and Conclusions and with the second portion of the Cease and Desist Order made by the Hearing Examiner and filed by him with the Federal Trade Commission, filed with the Federal Trade Commission on December 9, 1955, their Notice of Intention to Appeal from said Cease and Desist Order. [Trans. p. 37.]

The attorney in support of the complaint, being dissatisfied with that portion of the Cease and Desist Order

made by the Hearing Examiner which in effect held that Rule 44 of the Rules and Regulations was promulgated without authority under the Fur Products Labeling Act, filed his Notice of Appeal from that portion of the Cease and Desist Order.

Briefs were filed, by petitioners and by the attorney in support of the complaint for the Commission, in both appeals, and on May 11, 1956, the respondent Commission made its Findings of Fact and Conclusions of Law and its Cease and Desist Order in which it ordered petitioners to Cease and Desist from committing the acts alleged in the complaint to be violative of the Fur Products Labeling Act and its Rules and Regulations, not only in connection with the introduction, sale, advertising or offering for sale, or the transportation or distribution of any fur product in commerce, but also in connection with the sale, advertising, offering for sale, transportation or distribution of fur products in intrastate sales. [Trans. pp. 38-72.]

The Cease and Desist Order was served upon petitioners by United States mail on May 23, 1956.

Petitioners being dissatisfied with the Order made by the Federal Trade Commission did, on July 9, 1956, within sixty days after the making of said Order, file with the above entitled court their Petition for Review of the Order of the Federal Trade Commission [Trans. pp. 143-152, incl.] and petitioners did on August 31, 1956, file with the above entitled court their Statement of Points Relied Upon on Review. [Trans. p. 153.] Copies of each of said instruments was served upon counsel for the government.

The questions involved upon this Review, are as follows:

1. Does the evidence support the Findings of Fact and Conclusions of Law made by respondent Commissioner that petitioners are engaged in interstate commerce within the concept of "commerce" under the Federal Trade Commission Act and Section 3(a) of the Fur Products Labeling Act?

This question requires a review of the evidence [Trans. pp. 80-82, incl.; pp. 126-128, incl.], an interpretation of the acts in question and respondent Commissioner's Finding of Fact. [Trans. p. 40.]

2. Does the evidence support the Findings of Fact and Conclusions of Law made by the respondent Commissioner that petitioners are engaged in interstate commerce within the broader concept of "commerce" under Section 3(b) of the Fur Products Labeling Act?

This question involves an interpretation of the Fur Act and the Findings of Fact of respondent Commissioner. [Trans. pp. 39-40.]

3. Does the complaint charge that the unfair methods of competition allegedly engaged in by petitioners is independent of, and unrelated to, the Fur Products Labeling Act and the rules and regulations promulgated thereunder?

This question involves an interpretation of the complaint. [Trans. pp. 11-17, incl., and the Fur Act.]

4. Assuming that petitioners are engaged in interstate commerce, are they required to abide by the provisions of Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission pursuant to Section 8(b) of the Fur Products Labeling Act?

This question involves an interpretation of the language of the Fur Act and judicial construction of legislative language.

5. Assuming that petitioners are required to abide by Rule 44, either as a rule properly promulgated by the respondent Commissioner under the Fur Act, or as a standard of conduct under the Federal Trade Commission Act, irrespective of the Fur Act, have petitioners violated subdivisions (a), (b), and (c) of said Rule?

This point involves a review of the evidence [Trans. pp. 90-135, incl.], respondent Commissioner's Findings of Fact [Trans. pp. 45-46], and the interpretation of the language of said subdivisions.

Specifications of Error.

1. The respondent Commission erred in finding and concluding from the evidence that petitioners are engaged in interstate commerce as contemplated by the Federal Trade Commission Act.

The evidence shows that petitioners did not sell fur products in interstate commerce; that they transported in interstate commerce seven fur products out of ten hundred sixty-three separate sales of fur products made by them in purely intrastate transactions. Such evidence does not support the finding and conclusion that "this constitutes a course of trade in commerce among and between the various states of the United States, as 'commerce' is defined in the Federal Trade Commission Act." [Trans. p. 40.]

2. The respondent Commission erred in finding and concluding from the evidence and from its interpretation of Section 3(b) of the Fur Act, that petitioners are en-

gaged in interstate commerce under the broad concept of commerce contemplated by said Section.

The evidence shows and respondent Commissioner found that the petitioners sell “fur products” which “fur products” are shipped to them in interstate commerce; the evidence does not show, nor did the respondent Commission find, that petitioners sell “fur products” made of “fur” which has been shipped or received by petitioners in interstate commerce; the evidence shows that petitioners advertised “fur products” in local newspapers which have some interstate circulation but there is no evidence that such advertisements are, “advertisements for sale in interstate commerce”; petitioners did not stipulate that they are engaged in interstate commerce; the foregoing evidence and findings does not support the conclusion of respondent Commissioner that such conduct “brings their business activities within the concept of commerce under the Fur Products Labeling Act.” [Trans. p. 40.]

3. The respondent Commission erred in concluding that petitioners are charged in the complaint with the commission of unfair and deceptive acts and practices and unfair methods of competition under the Federal Trade Commission Act independently of violations of the provisions of the Fur Act and the rules and regulations promulgated thereunder.

The complaint charges violations of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and that such violations constitute unfair and deceptive acts and practices in commerce; there is no allegation that a rule comparable to Rule 44 was promulgated under the Commission Act.

4. The respondent Commission erred in concluding that it had authority to promulgate Rule 44 by virtue of the provisions of Section 8(2)(b) of the Fur Act.

Section 8 of the Fur Act authorizes respondent Commission to promulgate such rules and regulations as are necessary for administration and enforcement of the Act and does not authorize the promulgation of rules extending the coverage of the Fur Act and constituting legislation.

5. The respondent Commission erred in making that portion of its Cease and Desist Order denominated C(2) (a), (b) and (c) since said portion of the Order is contrary to law and based upon a definition of the word "fictitious" not contained within the language of Subdivision (a) of Rule 44.

The word "fictitious" contained in Rule 44 is not defined as "any price at which the fur product has not been sold within the recent regular course of business" of the affected person; the definition of the word "fictitious" as contained in the complaint is not in accordance with the ordinary and accepted definition thereof.

6. The respondent Commission erred in making any Order that petitioners cease and desist from committing any of their acts or conduct in the operation of their business.

Since the evidence does not support the findings or conclusions that petitioners are engaged in interstate commerce under any concept thereof, the respondent Commission was without jurisdiction to make any Cease and Desist Order.

Summary of Argument.

I.

The evidence and findings of fact require the conclusion that petitioners are not engaged in interstate commerce in the operation of their business.

II.

Assuming petitioners are engaged in interstate commerce they are nevertheless not bound by the provisions of Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission pursuant to the Fur Products Labeling Act.

III.

Petitioners are not charged with having violated the Federal Trade Commission Act independently of and without reference to the Fur Products Labeling Act and its rules and regulations.

IV.

In order for petitioners to be charged with unfair acts and conduct in commerce, and unfair competition under the Federal Trade Commission Act, the Commission would have had to adopt rules and regulations under said act comparable to those contained in Rule 44 of the Fur Act.

V.

The United States Court of Appeals has power to conform an order of the Federal Trade Commission to pleadings and findings and to powers conferred by Congress.

VI.

Assuming petitioners are required to abide by Rule 44, they have not violated said rule or any of its subdivisions.

ARGUMENT.

I.

The Evidence and Findings of Fact Require the Conclusion That Petitioners Are Not Engaged in Interstate Commerce in the Operation of Their Business.

Interstate commerce is defined as “commerce among the several states or with foreign nations or between points in the state but going through any place outside said state.”

Fur Products Labeling Act, Sec. 2(j);

Federal Trade Commission Act, Sec. 4.

Although goods may at one time have been the subject of interstate commerce, they may nevertheless, at another time, become the subject of intrastate commerce when commingled with the bulk of goods within a state after arriving at their destination.

General Tobacco Co. v. Fleming, 125 F. 2d 596;

Vance v. Vandercook, 170 U. S. 438;

Packer Corporation v. Utah, 285 U. S. 105;

Schechter Poultry Co. v. United States, 295 U. S. 495;

Magano v. Hamilton, 292 U. S. 40;

Winslow v. Federal Trade Commission, 227 Fed. 206.

Paragraph 2 of the complaint alleges that petitioners are engaged in the purchase, sale and distribution of “fur products” and that petitioners caused said “fur products,” when sold, to be transported from California to purchasers located in various other states, and concludes, therefore, that petitioners are engaged in interstate commerce. [Trans. p. 3.]

While petitioners are not charged, in this paragraph, with selling in interstate commerce, but only with transporting in interstate commerce, they are charged in paragraph 3 of the complaint with introducing, selling, advertising, offering for sale, transporting and delivering, "*fur products*" in interstate commerce. [Trans. p. 4.] The basis of this charge is Section 3(a) of the Fur Act.

Petitioners are also charged in paragraph 3 of the complaint with selling, advertising, offering for sale, transporting and distributing "*fur products*" which have been made in whole or in part of "*fur*" which had been shipped or received in commerce. [Trans. p. 4.] The basis of this charge is Section 3(b) of the Fur Act.

Petitioners are not charged with violating Section 3(c) of the Fur Act which pertains to the sale, etc., of "furs" as distinguished from "*fur products*."

Petitioners are unable to find any cases, involving the interpretation of interstate commerce, in which it has been held by the Federal courts that a retail merchant is engaged in interstate commerce in the sale of his products solely because in infrequent and isolated sales, *made in his place of business*, such products find their way into interstate transportation channels. The findings of fact made by the respondent Commission, as well as the evidence, clearly shows that while petitioners are engaged in the sale and distribution of "*fur products*," all of the sales are made in their place of business in Los Angeles, California, to purchasers who are present in petitioners' place of business at the time of such sales. These findings further show that all such "*fur products*" were delivered to purchasers thereof in petitioners' place of business, except that the evidence does show that out of 1063 separate sales made by petitioners in the months of

September, October, November and December, 1953, seven "fur products" were transported by petitioners to the purchaser's address outside of the State of California. [Trans. p. 40; pp. 126-128, incl.] It is reasonable to infer, at least there is no proof to the contrary, that this small percentage (.006+) of sales of "fur products" not delivered in petitioners' store, generally prevails in petitioners' business. The fact that in these purely local agreements for the sale of "fur products," a small fraction of the purchasers decide to have their purchases shipped out of the State, instead of accepting delivery at petitioners' place of business, does not change the character of petitioners' business from a purely intra-state one to an interstate one.

These facts do not support, either the conclusion reached by the respondent Commission, or the charge contained in paragraph 2 of the complaint, that petitioners, *in the sale of "fur products" maintain a course of trade in interstate commerce.*

According to the rules of statutory construction the language of Section 3(b) of the Fur Act contemplates an "advertising for sale in commerce," as distinguished from, an "advertising in commerce." The language employed in the Section is *advertising or offering for sale in commerce*. The use of the disjunctive "or" requires that the Section be read as follows: "advertising for sale in commerce, or offering for sale in commerce."

Since the evidence shows that petitioners were not engaged in the sale of "fur products" in commerce; that all business was conducted locally in petitioners' place of business in Los Angeles, California; and that all sales and all deliveries (except isolated ones) were made in petitioners' store, the advertising caused to be disseminated

in the Los Angeles Examiner was not an “advertising for sale in commerce.”

Furthermore, the Order, made by respondent Commission, indicates that the correct interpretation of Section 3 (a) of the Fur Act requires that the advertising must be in connection with an “*offering for sale in commerce*” of the “*fur product*.” The Order made by respondent restrains petitioners from “advertising or offering for sale . . . any fur product in commerce.” [Trans. pp. 52, 57.] The mere fact of advertising, disconnected from, and in no way related to, the doing of business, either in the sale of a commodity, the sale of a service, the solicitation of funds, the sale of intelligence or anything which requires further action on the part of the advertiser or the person reading the advertisement, does not constitute *engaging in business in commerce*. The advertising must contemplate the eventual entry into the stream of interstate commerce of the “fur product” in order to affect interstate commerce and make the advertiser amenable to the provisions of the Fur Act.

It is inferred, by respondent Commission, from its reference to the fact that petitioners purchase “*fur products*” *outside the State of California*, that the provisions of Section 3(b) of the Fur Act contain a further definition of interstate commerce. Respondent concludes, that since 25% of petitioners’ “fur products” were shipped to them from outside the State of California and subsequently advertised in newspapers in interstate commerce, petitioners are engaged in interstate commerce as defined by Section 3(b) of the Fur Act.

The conclusion of respondent is contrary to its own findings of fact construed in the light of Section 3(b) and is also a misconception and a misinterpretation of the purport of Section 3(b) of the Fur Act.

Sections 3(a), 3(b) and 3(c) of the Fur Act are not *definitions of interstate commerce*, but are declarations of what conduct, on the part of persons who are engaged in interstate commerce, constitutes unfair methods of competition and unfair acts and practices which subjects them to prosecution by the Federal Trade Commission, either by criminal proceedings or by injunction.

Should the Commission's conclusion be justified, that Section 3(b) of the Fur Act constitutes a further definition of interstate commerce, an examination of Sections 3(a), 3(b) and 3(c) and an analysis of the Commission's findings in the light of these sections, clearly demonstrates that petitioners are not engaged in interstate commerce within the purview of Section 3(b) of the Fur Act as charged in paragraph 3 of the complaint.

Section 3 of the Fur Act is divided essentially into three different and distinct categories:

- (1) The sale, etc., *in commerce of fur products*;
- (2) The sale, etc., *in commerce of fur*; and,
- (3) The manufacture, etc., of "*fur products*" (not necessarily for sale in commerce) but made in whole or in part of "*fur*" *shipped and received in commerce*. (Fur Act, Sec. 3(b).)

Definitions of "fur" and "fur products." Section 2 (b) of the Fur Act defines "fur" to mean any animal skin or part thereof in its raw or processed state; Section 2(d) defines "fur product" to mean any article of wearing apparel made in whole or in part of "fur."

Section 3(b) of the Fur Act, unlike Sections 3(a) and 3(c), deals with manufactured *fur products*, which have not found their way into interstate commerce, but which have been manufactured in whole or in part of

“furs” which have been shipped and received in commerce. It is the shipping and receiving, in interstate commerce, of *“furs” (skins)* that causes the manufactured *“fur product” (wearing apparel)*, to become a part of interstate commerce.

Section 3(a) of the Fur Act condemns as an unfair practice the introduction, manufacture for introduction, the sale, advertising or offering for sale, transportation or distribution, *in commerce* of any *“fur product.”* It should be observed that each act is followed by the words, *“in commerce”* or *“into commerce”* and pertains to *“fur products.”*

Section 3(c) of the Fur Act condemns as an unfair practice the introduction, sale, advertising for sale, transportation, or distribution *in commerce* of a *“fur.”* It should be observed that each act is followed by the words *“in commerce”* and pertains only to *“fur”* as distinguished from a *“fur product.”*

Section 3(b) condemns as an unfair practice the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any *“fur product”* which is made in whole or in part of *“fur” which has been shipped and received in commerce.* It should be observed that unlike the provisions of Sections 3(a) and 3(c), the acts are not followed by the words *“in commerce”* and the section speaks of both *“fur products”* and *“furs.”* The *“fur products”* become subjects of interstate commerce, not because they are manufactured for sale *in commerce* or advertised for sale *in commerce*, or distributed or transported *in commerce*, but only because *the “furs”,* of which they are manufactured, *have been shipped and received in commerce.*

Since it was found as a fact by the Commission, from the uncontroverted evidence, that petitioners obtained approximately 25% of their “fur producers” by means of purchases made outside the State of California, then it follows that petitioners have not violated the provisions of Section 3(b) of the Fur Act. This section could only have been violated if petitioners purchased “furs” outside the State of California, *which were then shipped and received in commerce* and then manufactured into “fur products.”

The Findings of Fact do not justify the conclusion of the Commission, “that petitioners are engaged in interstate commerce because they advertised their ‘fur products’ for sale in newspapers having an interstate circulation.”

Under Section 3(b) of the Fur Act, it is not interstate advertising, that constitutes interstate commerce, but rather, it is advertising, *of whatever character*, of a “fur product” manufactured of “furs” *which have been shipped and received in commerce*, which constitutes interstate commerce.

Since petitioners have not violated Sections 3(a) and 3(c) of the Fur Act which deals with the sale, advertising and transporting in interstate commerce of “fur products” and “furs” respectively, the conclusion that petitioners are engaged in interstate commerce must find support in the fact that petitioners’ operation falls within the provisions of Section 3(b) of the Fur Act.

Section 3(b) does not contemplate the sale, advertising or transporting of either “fur products” or “furs” in interstate commerce; it contemplates the sale, advertising or transportation in intrastate commerce *of “fur products”* but only if such “fur products” are made in whole or in

part of “furs” (*skins*) which have been shipped and received in commerce in the form of “furs” (*skins*).

It becomes necessary to determine whether the words “shipped and received in commerce” contemplates that the shipment or receipt of the “furs” be by petitioners rather than by some person other than petitioners. It is the contention of petitioners that the only construction to be placed upon the words “shipped and received in commerce” is that the Congress intended that petitioners be a party to the shipment and receipt of the “furs” in commerce; this is made apparent by a consideration of the effect of the principle of “goods come to rest” upon the legislative intent of this section of the Fur Act.

In *General Tobacco v. Fleming, supra*, it was held that a wholesaler is not engaged in interstate commerce, even as to goods shipped to him from outside the state, where such goods are shipped directly to his warehouse, come to rest there, and are commingled with other goods before being resold to customers within the state. In *Vance v. Vandercook, supra*, it was held that the interstate character of a transaction continues until termination of a shipment and delivery at the place of consignment, and in *Packer Corp. v. Utah, supra*, it was held that interstate commerce continues as such until it reaches the point where the parties originally intended that the movement should finally end; in other words, transportation is completed when a shipment arrives at the point of destination and is there delivered.

Articles of interstate commerce are not, because of their origin, entitled to immunity from the exercise of state regulatory power since, when they have finally come to rest, they are no longer in interstate commerce channels. To the same effect is *Schechter Poultry Company v. United*

States, supra, Magano v. Hamilton, supra, and Winslow v. Federal Trade Commission, supra.

It appears, therefore, that under the principle of “goods come to rest,” personal property, once the subject of interstate commerce, may cease being subject to interstate commerce and may become the subject of intrastate commerce.

By reason of these decisions, it was not possible, constitutionally, for the Congress to provide that a “fur product” shipped and received in commerce continued to be the subject of interstate commerce after its receipt by petitioners and its being commingled with other fur products in petitioners’ place of business. By reason of the same principle of law, “fur products” shipped and received in commerce, once received by petitioners and commingled with their goods, are removed from interstate channels even though such “fur products” contain “furs” (*skins*) which at one time were shipped and received in interstate commerce.

There is an exception to the “goods come to rest” principle which made it possible for the Congress to extend the coverage of the Fur Act to a limited extent to “fur products” *sold in intrastate commerce*, and it is an understanding of this exception to the rule which clarifies the purport of Section 3(b) of the Fur Act.

It has been held in several cases decided by the Federal Courts that there is an exception to the “goods come to rest” principle in those situations where “goods”, which

flow in interstate commerce channels, are not finished products but are received in interstate commerce for manufacture or processing. These cases hold that after shipment in interstate commerce these "goods" come to rest *only momentarily* for the purpose of manufacture or processing before being offered for sale and are, therefore, still in interstate channels until sold in their new form or state by the person receiving the "goods". This exception to the "goods come to rest" principle contemplates that the unfinished goods must be received by the person who converts them into finished products and then offers them for sale.

To contend that the receipt and shipment in interstate commerce of a "fur" (skin) by persons several times removed from petitioners (who receive only the finished product), does not have the effect of removing the furs from interstate commerce, would be to run afoul of the principle of "goods come to rest." When skins are shipped to New York and received there by manufacturers, they may not as yet have become commingled with other skins or furs in the possession of these manufacturers since, under the exception to the rule, they have only come to rest momentarily and are still in interstate commerce, but, after their manufacture into "fur products" they are only in interstate commerce until received by petitioners in California. Once received in California, these finished products can no longer be said to have come momentarily to rest since they are now parts of "fur products" which have become commingled with other fur products in the possession of petitioners as consignees.

II.

Assuming Petitioners Are Engaged in Interstate Commerce, They Are Nevertheless Not Bound by the Provisions of Rule 44 of the Rules and Regulations Promulgated by the Federal Trade Commission Pursuant to the Fur Products Labeling Act.

Assuming for the sake of argument that petitioners are engaged in interstate commerce, they are not bound by nor are they required to abide by the provisions of Rule 44 promulgated by respondent Commission.

The conclusion that petitioners are not bound by Rule 44 and all of its subdivisions, is based upon the fact that the Federal Trade Commission, in promulgating that rule, exceeded the authority vested in it by the 82nd Congress by virtue of Section 8(b) of the provisions of Public Law 110 entitled "Fur Products Labeling Act." Section 8(b) provides, "the Commission is authorized to prescribe rules and regulations . . . as may be necessary and proper for the purposes of administration and enforcement of this Act."

It is an elementary principle of law that the Congress of the United States cannot delegate legislative powers to any administrative body, and with this rule of law in mind the Congress, in Section 8(b), authorized the Commission to prescribe only such rules *as are necessary and proper for purposes of administration and enforcement*.

Whether or not Rule 44, promulgated by the Commission, is necessary and proper for the administration and enforcement of the Fur Act depends upon the purpose and intent of the Congress as expressed in the language of the Act.

An examination of the material provisions of the Fur Products Labeling Act, in order to determine its scope and subject matter, demonstrates that it was not intended to prohibit pricing practices and that any rules promulgated by the Commission relating to pricing practices is an attempt to promulgate rules, not for enforcement and administration of the Act but for enlargement of its scope and subject matter.

Somewhat indicative of the scope of the Act is the title and preamble which refer to the act as a *labeling act*.

Labeling of fur products and furs can be accomplished by labels attached to the fur products and furs, by price tags, by advertising in newspapers, and by invoicing. By any of these means consumers and others may be informed of the composition of the fur products respecting portions of the skins used, the animals from which the skins were obtained, whether of used or new skins, country of origin of the animals, whether the skins were bleached, dyed or otherwise processed. Consequently, the Act is described as one to protect consumers and others against misbranding, false advertising and false invoicing of *fur products and furs*.

Section 4 defines misbranding of fur products.

Section 5(a) defines false advertising of fur products.

Section 5(b) defines false invoicing of fur products.

All three sections contain subdivisions which provide that a fur product is misbranded, falsely advertised or falsely invoiced if the label or advertisement or invoice does not show;

- (a) The name or names of the animal that produced the fur;

- (b) That the fur product contains used fur if such is the fact;
- (c) That the fur product contains bleached or dyed fur if that is the fact;
- (d) That the fur product is composed of paws, bellies and waste fur, if that is the fact;
- (r) The country of origin of imported furs used in the product.

And in each instance, the fur product is misbranded, *falsely advertised* or falsely invoiced *if a label, advertisement or invoice* shows the name of an animal other than the name designated in the Fur Guide.

Misbranding is also accomplished if a label fails to show the name of the manufacturer if registered. False invoicing is also accomplished by failing to show the name of the person issuing the invoice.

Section 5(a) further provides that any fur product or fur shall be considered to be falsely advertised if the advertisement, which is intended to aid in the sale of the fur product does not show all of the required information *provided in the subdivisions*.

What Section 5(a) in effect provides, is that any advertisement of a fur product is a false advertisement only if it does not set forth the required information *contained in the subdivisions*. In other words, it is not the inclusion in the advertisement of comparative pricing, whether true or false, that determines if the advertisement is false; the falsity of the advertisement results only from a failure to comply with the requirements of subdivisions 1 to 6 of Section 5(a), and Rule 38, of the Fur Act.

Thus it is apparent, from all of the material provisions of the Fur Act, that Congress is enacting the Fur Products Labeling Act intended to, and did, prohibit the affected persons from labeling, advertising or invoicing fur products in such a manner that prospective purchasers would be led to believe that a fur garment was made of the skins of animals other than the animal from which the skin was obtained; that the fur garment was made of choice portions of the animal's skin instead of paws, bellies or tails, if that be the fact; that the fur garment was made of furs of imported animals rather than domestic animals or parts of each, if that be the fact; or that the skins were not dyed or bleached, if in fact they were, and any other facts or information concerning *the composition or processing of the fur product*.

It is understandable that Rule 38, of the rules promulgated by the Commission, which pertains to advertising of fur products, is necessary and proper for enforcement and administration of the Act, because it provides that the information, *required by the Act itself*, be set out in legible and conspicuous type; that non-required information be set forth in such a manner as not to interfere with the required information and other such requirements, all having reference to the information specifically required by the Act.

Respondent Commission contends that by reason of a catch-all clause the Fur Act does prohibit false pricing advertisements and justifies the promulgation of rules relating thereto.

Assuming that subdivision (5) of Section 5(a) of the Fur Act was intended to be the last subdivision in Section 5(a), its meaning remains unchanged. Subdivision (5),

whether it precedes or follows subdivision (6), reads as follows:

“contains the name or names of any animal . . . , or contains any form of misrepresentation or deception, directly or by implication, *with respect to such fur product or fur.*”

A catch-all clause has the effect of including amongst the prohibited acts only such other acts as are of the same kind, character and category as the specifically enumerated prohibited acts. None of these specifically enumerated prohibited acts relate to the “pricing” of fur products; they all relate to the “composition” of fur products.

Nor is it necessary to apply this elementary rule of statutory construction. The catch-all clause, by its own language, limits the forms of misrepresentation and deception to which it refers to misrepresentations and deception with respect to the fur product or fur. The catch-all clause provides as follows: “contains any form of misrepresentation or deception . . . , *with respect to such fur product or fur.*” It is to be seen that the catch-all clause by the foregoing language prohibits misrepresentation *with respect to the fur product* as distinguished from misrepresentation *with respect to the price of the fur product*.

That too much scope and latitude is claimed by the Commission for the catch-all clause is illustrated by the fact that the identical catch-all clause is contained in the sections of the Act on “misbranding” and “invoicing,” where it cannot have the same scope and latitude as is attributed to it in the section on “advertising.” Section 4(1) on misbranding and Section 5(b)(2) on invoicing,

contain the same language as is used in Section 5(a)(5) on advertising.

There can be no merit to the contention that with respect to “misbranding” of fur products, the language, “contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product,” refers to anything but the description and composition of the fur product. The definition of “invoicing,” contained in Section 2(f) of the Fur Act, at least with respect to a retail fur operation, refers to an instrument given to the purchaser after the sale of the fur product is consummated. No purpose is to be served in legislation prohibiting deceptive pricing practices in connection with *invoices given to a customer after the fur product has already been sold*.

The interpretation, construction and effect to be given to the catch-all clause must of necessity be the same in all three instances; the same language cannot have different meanings simply because used in different sections of the Act.

The intent and meaning of the Fur Act is to require all of the affected persons to inform the consumer, by all means possible, of the kind, quality, origin and other particulars of the animal and parts of the animal relating to a fur product so that the consumer can more intelligently make his purchase.

The Fur Act is not a pricing act and any rules and regulations promulgated by the Federal Trade Commission prohibiting pricing practices is not authorized and is beyond the jurisdiction of the Commission to promulgate, *as being necessary and proper, for purposes of administration and enforcement*.

Respondent Commission justifies its position, that the catch-all clause of Section 5(a) (5) proscribes advertising as to pricing, by the following language contained in its opinion [Trans. pp. 61-62]: “Hence, if the acts catalogued as price misrepresentations and the matters which persons are forbidden to advertise under the various paragraphs of Rule 44 are practices *forbidden under the Act itself* (Fur Act), then the rule must be regarded as a valid exercise of the Commission’s authority to promulgate rules.” This position taken by respondent Commission is based upon the false premise that the Fur Act itself forbids the things contained in the subdivisions of Rule 44. This is the very point under attack on this Petition for Review.

Contrary to this statement and indicative of the fact that respondent recognizes that the Fur Act does not contain any pricing prohibitions is the following language of its opinion [Trans. p. 66]: “The absence of reference in the Act to pricing misrepresentations is nowise controlling.”

In *State v. Thompson*, 232 P. 2d 87, it was held that the principle “*ejusdem generis*” requires that general terms appearing in a statute in connection with precise, specific terms, shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms. In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms, where both are used in sequence or collocation, in legislative enactments. And in *Smith v. Higgenbotham*, 28 A. 2d 754, the rule “*ejusdem generis*” is based upon the supposition that if the Legislature had intended the general words to be considered in an unrestricted sense, it would not have enumerated the particular things.

III.

Petitioners Are Not Charged With Having Violated the Federal Trade Commission Act Independently of and Without Reference to the Fur Products Labeling Act and Its Rules and Regulations.

Petitioners are charged with violating the Federal Trade Commission Act only insofar as they have violated the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Paragraphs 16 and 20 of the complaint charge that all of the acts committed by petitioners are violative of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, and that it is the commission of these acts which constitute unfair and deceptive practices under the Federal Trade Commission Act. Should Rule 44 be disregarded, as having been promulgated without authority, there would be no violations as to pricing or value representations under the Fur Act, and thus, no unfair or deceptive acts or practices under the Federal Trade Commission Act.

It is the contention of respondent Commission, expressed in its conclusions of law, that the acts and practices of petitioners as alleged in the complaint are violative of the Federal Trade Commission Act and would be so even without the existence of the Fur Products Labeling Act and Rule 44 promulgated thereunder, and it therefore concludes, petitioners are charged in the complaint with having committed acts, with respect to comparative pricing, price savings and reductions, which constitute unfair competition under the Federal Trade Commission Act, irrespective of Rule 44 and of the Fur Products Labeling Act.

However, Section 3 of the Fur Act provides “misbranding and false and deceptive advertising and invoicing, *within the meaning of the Fur Products Labeling Act*, shall be an unfair method of competition under the Federal Trade Commission Act.” It becomes apparent that the acts of petitioners which are to be examined are the acts committed in violation of the intent and meaning of the Fur Products Labeling Act, and not in violation of the intent and meaning of the Federal Trade Commission Act.

The Fur Products Labeling Act which prohibits misbranding, false advertising and false invoicing, declares such conduct to be unlawful and provides a criminal penalty in Section 11, for a violation thereof.

Apparently, the Congress of the United States realizing that it would be difficult to obtain evidence of violations of the Act without access to the books and records of the affected persons, and because no person can be required to incriminate himself, evolved a plan to permit a cease and desist proceedings, to which no criminal penalty is attached, to be brought against the affected persons and this plan was accomplished by incorporating in the Fur Products Labeling Act, Section 8 thereof.

Section 8 of the Fur Act provides that the Federal Trade Commission shall enforce the Fur Act in the same manner and by the same procedure and with the same powers as though all applicable terms and provisions of the Federal Trade Commission Act were a part of the Fur Act, and Section 8 further provides that the same immunities and privileges as are provided for in the Federal Trade Commission Act are incorporated in the Fur Act by reference.

It is further provided in Section 8 of the Fur Act that the Federal Trade Commission is authorized to prescribe rules and regulations governing the manner and form of disclosing information required by the Fur Act and such rules and regulations as may be necessary and proper for purposes of administration and enforcement thereof.

It becomes apparent from the foregoing that in order to enforce the provisions of the Fur Products Labeling Act, by a cease and desist proceeding, rather than by a criminal proceeding as provided for in Section 11 of the Act, it becomes necessary that, in any such cease and desist complaint which might be issued, it be alleged, not only that the acts and conduct of the persons charged in the complaint are unlawful and violative of the Fur Act, but, that the acts and conduct, violative of the Fur Act, *also* constitute unfair methods of competition under the Federal Trade Commission Act.

And so it is provided in each of Sections 3(a), 3(b) and 3(c) of the Fur Act, that the misbranding, false advertising and false invoicing is an unfair method of competition and an unfair act under the Federal Trade Commission Act *only* if the misbranding, false advertising or false invoicing is false and deceptive *within the meaning of the Fur Act*, and the rules and regulations promulgated thereunder. It is apparent therefor, from these sections of the Fur Act, that it is not misbranding or false or deceptive advertising or invoicing, standing alone, which is an unfair method of competition under the Federal Trade Commission Act, but it is the misbranding or false or deceptive advertising or invoicing *within the meaning of the Fur Act and its rules* that makes these false and deceptive acts an unfair method of competition under the Commission Act.

In order for a cease and desist proceedings to be brought by the Federal Trade Commission pursuant to Section 8 of the Fur Act, against persons affected by that Act, it is necessary for the complaint to allege (1) the interstate nature of the business, (2) the misbranding or false or deceptive advertising or invoicing of the fur products, (3) that the misbranding or false or deceptive advertising or invoicing was false or deceptive within the meaning of the Fur Act and its rules, *and*, (4) that the misbranding or false or deceptive advertising or invoicing constitutes an unfair method of competition under the Federal Trade Commission Act. (Sec. 3(a), (b), (c).)

In view of the necessity of alleging that the misbranding, etc., constitutes "an unfair method of competition under the Federal Trade Commission Act," any complaint for a cease and desist order *brought under the Fur Act* must make reference to the Federal Trade Commission Act and the prohibition provided therein against unfair methods of competition. (Sec. 3(a), (b), (c).)

The foregoing analysis of the acts in question and a study of the entire complaint must lead to the conclusion that the Federal Trade Commission, in issuing its complaint, sought to charge a violation of the Fur Products Labeling Act and its rules and regulations and the complaint had, of necessity, to refer to the Federal Trade Commission Act in order to support its request for *a cease and desist order* as opposed to a request for the imposition of a criminal penalty under Section 11.

The conclusion of respondent Commission, that the pleading, in paragraph 16, of the same acts which are pleaded in paragraph 5 of the complaint, places the two pleadings in parallel with each other thus making para-

graph 16 independent of paragraph 5, is certainly not warranted, and an examination of the two paragraphs indicates that paragraph 16 is supplemental to paragraph 5 and is necessary to complete a cause of action justifying a cease and desist order if one could be justified at all.

Paragraph 5 of the complaint alleges the commission of acts constituting false advertising, and price misrepresentation, relating to Rule 44, while paragraph 16 alleges that those acts were in violation of the Fur Act and constituted unfair and deceptive practices under the Commission Act, both of which allegations are necessary to support a prayer for a cease and desist order under the Fur Act.

IV.

In Order for Petitioners to Be Charged With Unfair Acts and Conduct in Commerce, and Unfair Competition Under the Federal Trade Commission Act, the Commission Would Have Had to Adopt Rules and Regulations Under Said Act Comparable to Those Contained in Rule 44 of the Fur Act.

In 1946 the Congress adopted the Administrative Procedure Act, 5 U. S. C., Chapter 19, Sections 1001 to 1011 inclusive. It is provided in said Act that the adoption of rules and regulations by an administrative agency is legislation on the administrative level within the language of the Statute granting power to the administrative agency as required by the Constitution and its doctrine of nondelegability and separability of powers.

In view of the fact that such rule making is legislation, even though on the administrative level, it becomes necessary, before such rule making can be valid or enforceable, that the administrative agency comply with all of the requirements laid down in the Sections under Chapter 19.

That rules and regulations, not promulgated pursuant to the requirements of Chapter 19, are not valid and enforceable is indicated in *Willapoint Oysters v. Ewing*, 174 F. 2d 676, in which case the Food and Drug Administrator, pursuant to the Food and Drug Administrative Act, made an order, adopting certain rules and regulations, in compliance with the requirements of the Administrative Procedure Act by publishing in the Federal Register the intention to hold a hearing for the adoption of rules and regulations and inviting the public to appear and be heard respecting the proposed rules.

In 1947 the administrator adopted other rules and regulations inconsistent with and contrary to the previous rules and regulations adopted in 1944. In rejecting the contention of the petitioner that the 1944 rules and regulations could not be changed by the administrator except by congressional legislation, the court on appeal held that the 1944 regulations were valid and continued to be so until modified or superseded either by subsequent legislation *or by subsequent regulations adopted in compliance with duly ordained standards of administrative procedure.*

Since the rules and regulations, adopted in 1947 modifying the earlier rules, were adopted in accordance with all of the requirements laid down by Chapter 19 of the Administrative Procedure Act, relating to the making of an order adopting rules and regulations, it was held by the court that the earlier regulations had been effectively and unqualifiedly modified.

It is apparent from the decision in this case that before petitioners herein could be charged with unfair acts and conduct, and unfair competition in commerce under the Federal Trade Commission Act, it would have to be alleged in the complaint that petitioners violated the

Federal Trade Commission Act and rules and regulations promulgated thereunder, setting forth the particular rules and regulations.

And in *Prima Products v. Federal Trade Commission*, 209 F. 2d 405, petitioner, in advertising its paint products used certain terms, in its advertising material, not prohibited by any rule adopted by the Federal Trade Commission. Subsequently the Commission adopted a rule prohibiting and regulating the terms used in advertising paint products.

After the adoption of this rule proceedings were brought against petitioner to restrain the use of the advertising material violative of the rule.

The court rejected the contention of petitioner that since the prohibited advertising material had been used by petitioner prior to the adoption of the rules under the Federal Trade Commission Act, petitioner could continue to use the prohibited material. *Once rules and regulations are adopted*, acts and conduct in violation thereof are prohibited although not previously proscribed by the Commission Act.

There is contained in the Rules of Practice under the Federal Trade Commission Act, 15 U. S. C., Federal Trade Commission, Section 45, procedure for the promulgation of trade practice rules similar to the requirements of the Administrative Procedure Act, hereinabove referred to. The particular rules are Rules 28 and 29.

V.

The United States Court of Appeals Has Power to Conform an Order of the Federal Trade Commission to Pleadings and Findings and to Powers Conferred by Congress.

In *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, it was held that on a petition to review an order of the Federal Trade Commission, the U. S. Court of Appeals can determine whether the Commission had properly exercised the administrative authority given it by Sections 41-46 and 57-58 of Title 15 U. S. C. (Fed. Trade Commission Act), and may not sustain or award relief beyond the authority of the Commission.

In *Federal Trade Commission v. Balme*, 23 F. 2d 615, it was held that the U. S. Court of Appeals has power to conform an order of the Federal Trade Commission, on a point of law, to pleadings and findings and may correct a law error in the Commission's order.

VI.

Assuming Petitioners Are Required to Abide by Rule 44, They Have Not Violated Said Rule or Any of Its Subdivisions.

Assuming for the sake of argument, that petitioners are engaged in interstate commerce, and that Rule 44 promulgated by the Federal Trade Commission under the Fur Products Labeling Act was within the Commission's authority to promulgate, the conclusion of respondent Commission that petitioners have misrepresented their prices, is not supported by the evidence. [Trans. pp. 90-135 incl.]

The uncontroverted evidence shows that the comparative prices used by petitioners in their advertising, price

tags and sales talks, were established by them in accordance with a policy of pricing which takes into consideration many factors such as cost, overhead, competition, quality, styling, and other such factors, and that prices were established when the "fur products" were received by petitioners and placed in stock, and in many instances, long before those prices were used as comparative prices in petitioners' advertising.

In paragraph 5 of the complaint it is alleged that in advertising comparative prices, reductions in prices and savings to be effected, petitioners advertised as their regular or usual price, a price which was in fact "fictitious," and in said paragraph a "fictitious" price is declared to be "fictitious" solely because petitioners had not, in the recent regular course of their business, sold any "fur products" at their so-called regular price.

In accepting the definition of the word "fictitious" as used in paragraph 5 of the complaint, respondent Commission disregarded the commonly accepted definition of the word "fictitious," which, in *Webster's New 20th Century Dictionary*, published in 1951, is defined as "feigned, imaginary, not real." To substitute for this definition a declaration that a price of a product is "fictitious" because the product, or a similar one, was not recently sold in the regular course of the business of the merchant, without regard to the factors generally taken into consideration by a merchant in establishing his prices, is to apply an unrealistic and arbitrary yardstick in the pricing field and demonstrates, on the part of officers enforcing the Fur Act, a complete lack of knowledge of practical business pricing considerations.

Were it not for the definition of "fictitious," as used in the complaint, respondent Commission would be com-

pelled to the conclusion that petitioners plainly ticketed or regular price was not “fictitious” in view of its finding that the plainly ticketed price or regular price was realized by petitioners in 50% of their sales, during their regular selling season, and by the further finding that, while petitioners did sell “fur products” at any of the three prices marked on their tickets, they would sell them preferably at the plainly ticketed or regular price, if it was possible to obtain it. [Trans. p. 46.]

Respectfully submitted,

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No. 15184

**In the United States Court of Appeals
for the Ninth Circuit**

JACQUES DE GORTER, AND SUZE C. DE GORTER, AS INDIVIDUALS AND AS CO-PARTNERS, TRADING AS PELTA FURS, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT AND APPENDIX

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15184

JACQUES DE GORTER, AND SUZE C. DE GORTER, AS INDIVIDUALS AND AS CO-PARTNERS, TRADING AS PELTA FURS, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION FOR THE REVIEW OF AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

I. STATEMENT OF THE CASE

This case arises upon a petition for the review of and to set aside an order to cease and desist, issued by the Federal Trade Commission, respondent, in an administrative proceeding charging Jacques De Gorter and Suze C. De Gorter, as individuals and as co-partners trading as Pelta Furs, petitioners, with violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and also with violation of the Federal Trade Commission Act.¹

¹ Pertinent provisions of the Fur Products Labeling Act, of the rules and regulations thereunder, and of the Federal Trade Commission Act are set forth in the appendix to this brief.

Petitioners' statement of the case is incomplete. We shall therefore restate the case, summarizing the allegations of the complaint under the heading of the Act to which they relate.

Fur Products Labeling Act ²

The complaint (Par. 3, Tr. R. p. 4) alleged that since August 9, 1952 (the effective date of the Fur Act), petitioners "have introduced, sold, advertised, offered for sale, transported and distributed fur products in commerce" and "have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as 'commerce', 'fur', and 'fur products' are defined in the Fur Products Labeling Act"; and the rules and regulations prescribed thereunder.

The complaint (Pars. 5, 7, and 8, Tr. R. 5, 7-9) further alleged that petitioners falsely and deceptively advertised certain of the fur products by causing the dissemination, in commerce, of newspaper advertisements, inserted in the Los Angeles Examiner, Los Angeles Times, and Los Angeles Herald and Express, which were intended to aid, promote, and assist in the sale and offering for sale fur products, but which did not comply with the provisions of Section 5 (a) of the Fur Act and the prescribed rules and regulations thereunder; that by means of such advertisements, and through petitioners' acts, practices, and representa-

² Hereafter sometimes referred to as the Fur Act.

tions appearing on price tags affixed to their fur products, petitioners directly and by implication:

1. Falsely represented that the price of their fur products had been reduced, in violation of Rule 44 (a);

2. Falsely represented the amount of savings to be effectuated by purchasers of their fur products, in violation of Rule 44 (b) and Rule 44 (c);

3. Falsely represented the grade, quality, or value of certain fur products, in violation of Rule 44 (f);

4. Falsely represented that the fur products were from the stock of a business:

- a. in state of liquidation, and

- b. consolidated with that of a fur mink manufacturer;

the complaint further alleged that petitioners failed to maintain full and adequate records to support the pricing claims and representations appearing in the advertisements and on their price tags, in violation of Rule 44 (e).

The complaint (Par. 6, Tr. R. 7) further alleged that petitioners falsely and deceptively advertised certain of their fur products in violation of Section 5 (a) of the Fur Act and the prescribed rules and regulations thereunder, in that certain advertisements disseminated in commerce as aforesaid:

1. Failed to disclose the name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed by the rules and regulations;

2. Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur; and

3. Failed to disclose the name of the country of origin of imported furs contained in such fur product.

The complaint (Pars. 9, 10, 11, and 12, Tr. R. 9-10) further alleged that petitioners misbranded certain of their fur products;

1. By falsely and deceptively identifying such fur products as "mink" on their labels attached thereto, in violation of Section 4 (1) of the Fur Products Labeling Act;

2. By not affixing thereto labels showing the information required by Section 4 (2) of the Fur Products Labeling Act and the rules and regulations;

3. By setting forth on the labels attached thereto the name of an animal other than the name of the animal producing the fur, in violation of Section 4 (3) of the Fur Products Labeling Act and the prescribed rules and regulations; and

4. Required information:

a. Was mingled on the labels with non-required information, in violation of Rule 29 (a);

b. Was not completely set forth on one side of the labels as required by Rule 29 (a);

c. Was set forth on labels in handwriting, in violation of Rule 29 (b); and

d. Was set forth on the labels in improper sequence, in violation of Rule 30.

The complaint (Pars. 13, 14, and 15, Tr. R. 10-11) further alleged that petitioners falsely and de-

ceptively invoiced certain of their fur products in that:

1. They were not invoiced as required by Section 5 (b) (1) of the Fur Act and in the manner and form prescribed by the rules and regulations;

2. The invoices furnished to purchasers set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 5 (b) (2) of the Fur Act and the prescribed rules and regulations;

3. Required information was set forth in abbreviated form, in violation of Rule 4; and

4. Did not contain an item number or mark assigned to fur products, in violation of Rule 40 (a).

Upon the basis of the above allegations, the complaint then charged (Par. 16, Tr. R. 11-12) that the acts and practices of petitioners were in violation of the Fur Act and of the prescribed rules and regulations, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Federal Trade Commission Act

The complaint alleged that petitioners caused to be disseminated, by publication in newspapers, advertisements of their fur products. Typical statements and representations contained in such advertisements were set forth in the complaint,³ and it was alleged (Comp. Pars. 18 and 20, Tr. R. 14, 15) that by their use and by the use of others similar thereto but not

³ See Pars. 4, 5, 6, 7, 8, 17, and 19, Tr. R. 4-8, 12, and 15.

specifically set out therein, petitioners falsely represented: that they were discontinuing operations and going out of business, that they were selling their entire stock at distress prices, that their fur products could be purchased at, or for less than, the amount paid for them by petitioners, that the prices marked on the price tags were the usual prices for such products during normal course of business. Petitioners' practices, it was charged (Comp. Pars. 22 and 23, Tr. R. 16-17), tended to deceive the public, divert trade from their competitors, and constituted unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act.

The complaint further alleged (Par. 21, Tr. R. 16) that petitioners in the course and conduct of their business were "engaged in interstate commerce, as 'commerce' is defined in the Federal Trade Commission Act" and "are in substantial competition in commerce with" others who are also engaged in the sale of fur products to the purchasing public.

In their answer, petitioners denied all material allegations of the complaint. With the issue thus joined, this matter regularly came on for hearings before one of the Hearing Examiners of the Commission. At the initial hearing, counsel for petitioners made the following stipulations (Tr. R. 73-74) on the record:

1. Petitioner Jacques De Gorter "has committed the acts alleged in Paragraph 6 of the complaint" but does not stipulate that such acts are false and misleading;

2. Petitioner has "committed the acts" alleged in Paragraphs 9, 10, 11, 12, 13, 14, and 15 of the complaint;

3. The facts alleged in Paragraph 21 of the complaint "are true and correct";

4. Petitioner Suze De Gorter has not committed any of the acts thus stipulated since January 31, 1954;

5. The Los Angeles Times and Los Angeles Examiner, newspapers in which petitioners have advertised their fur products have "a circulation outside of the State of California";

6. Petitioner Jacques De Gorter committed the acts alleged in Subsection (c) and Subsection (d) of Paragraph 5 of the complaint, in violation of Subsection (f) and Subsection (g) of Rule 44—reserving the right, however, to attack the legality of this Rule and all of its subsections; and

7. Advertisements placed by petitioners in the Los Angeles Times contain the language as set forth and alleged in Paragraph 17 of the complaint.

Upon the completion of the taking of evidence on behalf of all parties, the Examiner filed his initial decision containing his findings as to the facts, conclusions and order to cease and desist. Thereafter counsel supporting the complaint and counsel representing petitioners appealed to the Commission which, after hearing the matter upon briefs and oral argument, entered its decision on the 11th day of May, 1955, denied the appeal of petitioners (Tr. R. 67), vacated and set aside the initial decision of the Examiner (Tr. R. 67), and entered its own findings as

to the facts (Tr. R. 38-48), which accord with the allegations of the complaint as outlined above.

Based upon the facts found and set forth in Paragraphs 1 through 8 of its findings of facts (Tr. R. 39-48), the Commission concluded that through misbranding, false, misleading and deceptive statements, representations and advertising and false invoicing of their fur products, intended to aid, promote and assist in the sale of said products, petitioners had violated the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder; and that the use by petitioners of such acts and practices constituted unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Based upon the facts found and set forth in Paragraphs 9 and 10 of its findings of facts (Tr. R. 48-51) the Commission concluded that the use by petitioners of the false and misleading statements and representations appearing in their advertisements (CX's 12-16, Tr. R. 136-142) constituted unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act.

Upon the basis of its findings and conclusions, the Commission entered its order to cease and desist (Tr. R. 52-57). Paragraphs A, B, and C thereof, and the subdivisions thereunder, are directed to prohibiting the acts and practices of petitioners which the Commission found were in violation of the Fur Act and the prescribed Rules and Regulations, and, the pe-

nultimate paragraph of the order to cease and desist (unlettered and unnumbered) is directed to prohibiting the acts and practices of petitioners which the Commission found were in violation of the Federal Trade Commission Act.

Petitioners thereafter timely filed their petition for the review of and to set aside the order to cease and desist.

II. CONTESTED ISSUES

In their brief filed in support of their appeal to the Commission from the initial decision of the Examiner, petitioners raised only the issues of (a) interstate commerce, and (b) the legality of Rule 44 of the Rules and Regulations under the Fur Products Labeling Act. In their statement of points (Tr. R. 153-154) these same two issues were again raised and in addition a new issue, viz: whether the complaint charged petitioners with violation of the Federal Trade Commission Act as well as with violation of the Fur Act.

In their brief (12-38) petitioners develop their argument under six points. Point I is the issue of interstate commerce. Points II and VI raise the question of the legality of Rule 44 of the Rules and Regulations under the Fur Act. Points III and IV present the question of whether the complaint charges violation of the Federal Trade Commission Act as well as a violation of the Fur Act—this is the issue not raised below. Point V is not an issue but a statement of the power of a Court of Appeals on the review of an order to cease and desist.

Since ordinarily Courts of Appeals do not give consideration to issues not raised below, *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 34-38 (1952); *Hormel v. Helvering*, 312 U. S. 552, 556 (1941); *Kittler v. Commissioner of Internal Revenue*, 196 F. 2d 822, 827 (C. A. 7, 1952), for the reason that failure to thus raise the issue deprives the Appellate Court of the benefit and assistance of a decision by the trier of the fact, *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937); and, since the power of the United States Courts of Appeals on the review of an order to cease and desist is not an issue here, Points III, IV, and V are not properly before this Court. We therefore believe that the issues can for clarity and conciseness be stated as:

1. Are petitioners engaged in interstate commerce?, and
2. Is Rule 44 of the Rules and Regulations under the Fur Products Labeling Act within the rule-making authority conferred upon the Commission by the Act?

III. ARGUMENT

Preliminary statement

The facts in this matter are not in dispute and the applicable principles of law are well settled. The Commission's findings as to the facts, if supported by evidence, are conclusive. The statute so provides.⁴

⁴ Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. 45 (c); *Federal Trade Commission v. Standard Education Society, et al.*, 302 U. S. 112, 117 (1937).

This Court has often so held.⁵ It is well settled that the “weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn” therefrom are for the Commission, *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927), and the “possibility of drawing either of two inconsistent inferences from the evidence” does not prevent the Commission from drawing one of them, *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106 (1942).

It is also well settled that the Courts of Appeals must not “pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission,” *Federal Trade Commission v. Standard Education Society, et al.*, 302 U. S. 112, 117 (1937). Inferences of fact drawn by administrative agencies “may not be set aside upon judicial review because the Courts would have drawn a different inference,” *National Labor Relations Board v. Southern Bell Telephone Co.*, 319 U. S. 50, 60 (1943); *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106–107 (1942).

The above applicable principles of law have not been limited or restricted by the Administrative

⁵ *Philip R. Park, Inc. v. Federal Trade Commission*, 136 F. 2d 428, 429 (C. A. 9, 1943); *American Medicinal Products, Inc. v. Federal Trade Commission*, 136 F. 2d 426 (C. A. 9, 1943); *Lane v. Federal Trade Commission*, 130 F. 2d 48, 50 (C. A. 9, 1941), cert. denied 314 U. S. 630 (1941); *Electro Thermal v. Federal Trade Commission*, 91 F. 2d 477, 479 (C. A. 9, 1937), cert. denied 302 U. S. 748.

Procedure Act. The Administrative Procedure Act (60 Stat. 243-244, 5 U. S. C. § 1009 (e)), provides that administrative agencies should make their findings on the whole record "taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." In reviewing the decision of administrative agencies, the courts are to "consider the whole record." But "the requirement for canvassing 'the whole record' in order to ascertain substantiality" was not "intended to negative the functions of * * * those agencies presumably equipped or informed by experience to deal with the specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace [an agency's] choice between two fairly conflicting views, even though the courts would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 487-488 (1951).

The Supreme Court has also declared that the Commission was created with the "avowed purpose of resting the administrative functions committed to it" in a body of experts "specially competent to deal with them." *Humphrey's Executor v. United States*, 295 U. S. 602, 621, 625 (1935). It is "not the province of the Court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies." *Gray v. Powell*, 314 U. S. 402, 412 (1941).

In a proceeding of this nature the power of this Court is not administrative but judicial, and “the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission’s order becomes incontestable,” and “judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.” *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 501 (1943).

When a Court of Appeals takes upon itself the fact-finding function of the Commission and picks and chooses bits of evidence to make findings contrary to those of the Commission, the Supreme Court has had to step in and remind the Court that their review power is limited, *Federal Trade Commission v. Standard Education Society, et al.*, 302 U. S. 112, 117 (1937), and they must guard against the danger of sliding from the narrow confines of law into the broader and more spacious domains of policy and of fact-finding, *Phelps-Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 194 (1941).

This Court should also bear in mind that it should neither “substitute [its] own judgment” for that of the Commission, *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227 (1943), nor undertake to advise the Commission how to discharge its functions.” *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 617–618 (1944).

This brings us to a consideration of the two issues that are properly raised before this Court.

1. Petitioners are engaged in interstate commerce by the sale and distribution of their fur products

Petitioners' argument under this issue is such a classic example of begging the question, and their statement of the meaning of the plain and unambiguous language of the Act is so confusing and difficult to follow that we shall not attempt a detailed reply.

This is the first case involving the Fur Products Labeling Act to reach a Court of Appeals for review. At the outset, therefore, although the Commission did find that seven sales made by petitioners of their fur products were in interstate commerce and that "in procuring fur products from sources outside the State of California, and thereafter advertising and offering for sale in newspapers of interstate circulation, and then selling and shipping and delivering such fur products in commerce clearly brings their business activities within the concept of 'commerce' under the Fur Products Labeling Act" (Tr. R. 40), we desire to impress upon the Court that, unlike a proceeding under the Federal Trade Commission Act where interstate commerce is a jurisdictional issue, under the Fur Act it is not necessary to allege or establish that petitioners are engaged in the sale and distribution of their products in interstate commerce in order to acquire jurisdiction. Actually, under the facts in this case, the admitted advertisements of their fur products in interstate commerce and the admitted advertisements of their fur products which were made in

whole or in part of fur which had been shipped and received in commerce and which were admittedly misbranded, falsely and deceptively advertised and invoiced, gives the Federal Trade Commission jurisdiction of petitioners under the Fur Act even had petitioners not made any sale in interstate commerce.⁶

We shall therefore briefly point to the facts establishing violation by petitioners of the Fur Products Labeling Act and the pertinent rules and regulations thereunder and then to the facts which establish a violation of the Federal Trade Commission Act which does involve the question of interstate commerce.

Petitioners are engaged in the sale and distribution of fur products at their place of business in Los Angeles, California. They purchase 25% of their fur products from sources in New York City and the remaining from sources in Los Angeles. The fur products purchased in New York City are shipped to and received by petitioners in interstate commerce. Some of the fur products purchased by petitioners in Los Angeles were made from imported furs (skins). (Tr. R. 85-86)

Petitioners advertise their fur products in the Los Angeles Times and the Los Angeles Examiner—newspapers with a circulation outside of the State of California (Tr. R. 83). These advertisements contain the statements and representations set forth in Paragraph Seventeen of the complaint (Tr. R. 89).⁷ Petitioners stipulated (Tr. R. 73-74) that they committed the acts and practices set forth in Paragraphs 6, 9, 10, 11,

⁶ See subsections (a) and (b) of Section 3 of the Fur Products Labeling Act, Supp. Apdx. 57.

⁷ See CX's 12-16, Tr. R. 136-142.

12, 13, 14, and 15 of the complaint (Tr. R. 7, 9-11). By this stipulation petitioners admitted that their advertisements in the aforesaid newspapers failed to set forth the information required by subsections (1), (2) and (6) of Section 5 (a) of the Fur Products Labeling Act and the rules and regulations prescribed.

Petitioners further stipulated that certain of such products so advertised were misbranded in violation of Sections 4 (1), 4 (2), and 4 (3) of the Fur Products Labeling Act; that certain of their fur products so advertised were misbranded in violation of the Fur Products Labeling Act in that the labels attached thereto violated Rules 29 (a), 29 (b), and 30 of the prescribed Rules and Regulations under the Fur Products Labeling Act; that certain of such fur products so advertised were falsely and deceptively invoiced since they were not invoiced as required under the provisions of Sections 5 (b) (1) and 5 (b) (2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder; that certain of their said products so advertised were not invoiced in accordance with the rules and regulations prescribed and were in violation of Rule 4 and Rule 40 (a) of the said rules and regulations.

By stipulation (Tr. R. 89) petitioners stated that they misrepresented the grade and quality of their fur products by use of illustrations in their advertisements depicting higher priced or more valuable products than actually were available for sale, in violation of Rule 44 (f); that they misrepresented that

such fur products so advertised were from a stock of business in the state of liquidation and from a stock of business consolidated with that of a famous mink manufacturer, in violation of Rule 44 (g) of the prescribed Rules and Regulations, and as alleged in Paragraphs 5 (c) (d) of the complaint.

By the above stipulations petitioners admitted that certain of their fur products purchased and received by them in interstate commerce and certain of their fur products purchased in Los Angeles which contained imported fur (skins that had been shipped and received in interstate commerce) were, by them, (1) misbranded in violation of Section 4 of the Fur Products Labeling Act and of Rule 29 and Rule 30 of the prescribed Rules and Regulations; and (2) falsely and deceptively invoiced in violation of subsection (1) and subsection (2) of Section 5 (b) of the Act and of Rule 4 and Rule 48 of the prescribed Rules.

Petitioners further admitted that in advertising such fur products in interstate commerce they (1) had violated subsection (f) and subsection (g) of Rule 44, and (2) had failed to comply with the requirements of subsections (1), (2) and (6) of Section 5 (a) of the Act. Section 5 (a) of the Act (Apdx. ~~57~~ ⁵⁸) in substance declares that any advertisement of a fur products which does not comply with the provisions of its subsections (1 through 6) "shall be considered to be false and deceptive advertising." Under the provisions of this Section, petitioners' failure to comply with its provisions, their advertisements of their fur products is by law declared to be false and deceptive.

Upon the basis of the above, the Commission found that, (setting forth in detail the manner in which), petitioners had misbranded, falsely and deceptively advertised and invoiced certain of their fur products in violation of Section 4, Section 5 (a) and Section 5 (b) of the Fur Products Labeling Act. The Commission also found that, (setting forth in detail the manner in which), petitioners had misrepresented prices and savings, misrepresented that certain of their fur products were from a business in liquidation and from a business consolidated with that of a famous mink manufacturer, and that petitioners failed to maintain adequate records in violation of Rules 4, 29, 30, 40, and 44, respectively (Pars. 4, 5, 6, 7, and 8 of Findings, Tr. R. 40-48).

Upon making these findings the provisions of subsections (a) and (b) of Section 3 of the Fur Products Labeling Act was brought into the picture. Insofar as relevant here subsection (a) of Section 3 (Apdx. 57) declares that the advertising in interstate commerce "of any fur product which is misbranded or falsely or deceptively advertised or invoiced * * * is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act." Insofar as here relevant, subsection (b) of Section 3 (Apdx. 57) declares that the advertising "of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, * * * is unlawful and shall be an unfair method of competition, and an unfair or deceptive act

or practice, in commerce under the Federal Trade Commission Act.”

Upon the authority of those subsections of Section 3 of the Act, which made petitioners’ admitted acts and practices unlawful, the Commission concluded that—

this proceeding is in the public interest for the protection of consumers and others within the purpose and intent of the Fur Products Labeling Act; that respondents through misbranding, false, misleading and deceptive statements, representations and advertising, and false invoicing of fur products as covered, in Paragraphs 1–8, inclusive, intended to, and did, aid, promote and assist, directly or indirectly in the sale of said fur products; and that the use of the aforesaid practices by respondents has been and is unlawful within the meaning of the Fur Products Labeling Act and of the rules and regulations promulgated thereunder and constitute unfair methods of competition, and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

It will be noted that this conclusion of the Commission, and the facts upon which such conclusion is based, does not rest upon any finding of any sale made by petitioners nor upon any finding that petitioners are engaged in interstate commerce in the sale and distribution of their fur products. The Commission’s conclusion is based solely upon (1) petitioners’ interstate advertisements of a fur product which is misbranded and falsely advertised and invoiced, and (2) upon petitioners’ advertisements (not

necessarily interstate advertisements) of a fur product containing fur which has been shipped and received in interstate commerce, and which is misbranded or falsely and deceptively advertised or invoiced.

Upon the basis of the Commission's findings and its conclusions in this phase of the case, the Commission inserted in its order to cease and desist paragraphs A, B, and C and the various subdivisions thereunder directing petitioners to discontinue the acts and practices which were unlawful under the Fur Products Labeling Act.

It is, therefore, submitted that the question of whether petitioners in their sale and distribution of their products are engaged in a course of commerce, as "commerce" is defined under the Federal Trade Commission Act, is not an issue in this phase of this case.

Now, let us examine the facts upon which the Commission based its findings that the petitioners were engaged in a course of commerce, as "commerce" is defined in the Federal Trade Commission Act (Tr. R. 40).

Petitioners stipulated (Tr. R. 74) that in the course of their business they were in substantial competition in commerce with others engaged in the sale of fur products to the purchasing public, as alleged in Paragraph 21 of the complaint (Tr. R. 16).

Petitioner Jacques De Gorter testified that approximately 25% of the fur products advertised and sold by petitioners were purchased from sources in New York City and were shipped to and received by pe-

tioners at their place of business in Los Angeles. He said that petitioners advertise these fur products in the Los Angeles Times and Los Angeles Herald and stipulated that these newspapers had a circulation outside of the State of California (Tr. R. 83). Petitioners stipulated (Tr. R. 89) that these advertisements contained the statements and representations set forth in Paragraph Seventeen of the complaint (Tr. R. 16) and Jaques De Gorter identified (Tr. R. 102, 111, 112, 113, 114) Commission's Exhibits 12 through 16 as petitioners' advertisements of their fur products.⁸ Jacques De Gorter identified Commission's Exhibits 1 through 8 as being sales slips of fur products sold and shipped by petitioners to purchasers outside of the State of California (Tr. R. 79). He stated that in addition to these interstate sales petitioners had also sold and shipped fur products c. o. d. to other purchasers outside of the State of California. He said that the State of California has a sales tax which is collected on all sales made within the State but that petitioners did not collect this sales tax on the sales of their fur products as shown by Commission's Exhibits 1 through 8 or on the sales of fur products made and shipped by petitioners c. o. d. to purchasers outside the State of California (Tr. R. 80-82).

Based upon the interstate sales made by petitioners as shown by Commission's Exhibits 1 through 8 and upon the testimony of Jacques De Gorter (Tr. R. 79-82) in reference thereto the Commission found

⁸ See these exhibits, Tr. R. 136-142.

(Tr. R. 40) that although such sales “represent only a small proportion of all” sales made by petitioners during the months of September, October, November, and December of 1953, “they are not mere isolated instances, but constitute a course of trade in commerce among and between the various states of the United States, as ‘commerce’ is defined in the Federal Trade Commission Act.”

Based upon the stipulated and admitted facts as hereinabove set forth and upon the testimony of Jacques De Gorter (Tr. R. 90-105, 109-135) in reference to the statements and representations appearing in petitioners’ advertisements and in reference to the method and manner used by petitioners in pricing their fur products, the Commission found that petitioners’ acts and practices as set forth in Paragraphs 9 and 10 of its findings as to the fact (Tr. R. 48-51) were false, misleading and deceptive. The Commission concluded (Tr. R. 51-52) by the use of such false, misleading and deceptive acts and practices petitioners had violated the Federal Trade Commission Act and included in the order to cease and desist a paragraph directing petitioners to discontinue such false and deceptive acts and practices.⁹

We submit that the conclusion of the Commission that petitioners have violated the Federal Trade Commission Act and the inclusion by the Commission in its order to cease and desist a paragraph directing

⁹ See transcript of Record 57—the first unnumbered paragraph beginning on that page.

petitioners to discontinue such violation is supported by substantial evidence.

Petitioner's entire argument under this phase of the case (Br. 12-21) relates solely to the provisions of the Fur Products Labeling Act. We have attempted to demonstrate, insofar as the Commission's findings and order relate to the allegations of the complaint charging violation of the Fur Products Labeling Act and the prescribed rules and regulations thereunder, they are not based on any sales made by petitioners in interstate commerce but upon acts and practices of petitioners, other than sales, which the Act declares to be unlawful.

Petitioners' argument here is bottomed upon the "goods come to rest" theory—a theory that is based upon the entire absence of any sales made in interstate commerce of goods after they complete their interstate journey and come to rest in the State of their destination—citing (Br. 12) several cases in support thereof. This argument of petitioners is wholly irrelevant here and this case can easily be distinguished from those which petitioners rely upon. The Fur Act removes "furs" and "fur products" from the effect of the "goods come to rest" principle. In addition to this, the record establishes the fact that petitioners did sell some of their fur products in interstate commerce and this distinguishes the instant matter from those decisions in which the "goods come to rest" doctrine was applied and removes this case from the application of that doctrine.

The unambiguous language of subsections (a) and (b) of Section 3 of the Act specifically gives the Commission jurisdiction over certain Acts and practices therein declared unlawful as they relate to fur products which have ended their interstate journey. That it was the intention of Congress to give the Commission jurisdiction over these products after they came to rest in the State of their destination is clearly shown by the statement of Senator Lodge. The Senator proposed certain amendments to this Act, then before the Senate for consideration, and caused to be printed in the body of the Record a statement descriptive of his proposed amendments in which the following in reference to Section 3 (b) of the Act appears:

The proposed amendment would not weaken in the slightest the protection afforded the consumer against misbranding and false advertising. The retailer would continue to be bound by the affirmative disclosure requirements of the proposed act. The amendment would not deprive the Federal Trade Commission of jurisdiction over the garments involved. Section 3 (b) offers jurisdiction on every fur product made in whole or in part of fur which has been shipped or received in commerce. This means that such a fur product remains subject to all of the provisions of the proposed law and to the jurisdiction of the Commission up to the time it reaches the ultimate consumer, irrespective of whether or not such garments pass in commerce when sold by the retailer.

Because it will afford the retailer a very important right without weakening the underlying purpose of the bill, it is respectfully urged that the proposed amendment be incorporated into the fur-labeling bill. (Cong., Rec., February 22, 1951, 82d Cong., 1st sess., p. 1510).¹⁰

Representative O'Hara, sponsor of the Fur Act in the House, at a hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, on April 17, 1951, stated:

The Federal Trade Commission has endeavored to correct some of these practices. However, these practices are so widespread that enforcement by the Federal Trade Commission, through its normal processes, is exceedingly difficult. Furthermore, such practices are engaged in frequently by retailers who are beyond the reach of the Commission because they are engaged in intrastate rather than interstate commerce. Therefore, specific legislation on this subject is considered necessary. (Printed Report of hearings on H. R. 2321 before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, pp. 12-13).¹¹

And at a hearing before the same Committee on April 20, 1950, a representative of the Commission made this statement:

¹⁰ See also Report of Senate Committee on Interstate and Foreign Commerce (S. 508), Cal. No. 80, Report No. 78; Report of House Committee on Interstate and Foreign Commerce (H. R. 2321, June 11, 1951, Report No. 546).

¹¹ He made the same statement on the floor of the House, Cong. Rec., June 18, 1951, p. 6850.

In the first place, the legislation is needed because the principal evil finds expression down in the local sale—that is the final sale to the ultimate consumer—which, under ordinary general provisions of law, is beyond the reach of the Federal Trade Commission because of a lack of interstate commerce. (Printed Report of hearings on H. R. 2321 before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, p. 160).

We here note that relying on the “goods come to rest” decisions, petitioners state (Br. 20), “it was not possible, constitutionally, for the Congress to provide that a ‘fur product’ shipped and received in commerce continue to be the subject of interstate commerce after its receipt by petitioners and its being commingled with other fur products in petitioners’ place of business.” Petitioners here appear to be raising the question of constitutionality of the Fur Products Labeling Act. Except for their reference to the decisions of the Courts under the “goods come to rest” doctrine, which we have just above discussed, petitioners fail to point out in what respects the Act is unconstitutional, neither do they cite any authority in support of their contentions other than the “goods come to rest” cases. It is well established that the burden of establishing the unconstitutionality of a statute rests on him who assails it. This principle of judicial decision has long been emphasized and followed by the Supreme Court of the United States *Metropolitan Casualty Insurance Co. v. Brownell Receiver*, 294 U. S. 580, 584 (1934).

The evils sought to be removed by the Fur Act were misbranding, false and deceptive advertising, and invoicing of fur products. These evils were rampant in the sale of fur products in intrastate commerce, against which the power of the Commission under the Federal Trade Commission Act was impotent. These evils were polluting the channels of interstate commerce and occurring in almost every State. The welfare and economy of the Nation was being seriously affected. Congress had the power under the commerce clause to attempt to remove these evils by enacting the Fur Act. In *United States v. Wrightman Dairy Co.*, 315 U. S. 110 (1942)—a case involving the authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. 608 (c), to regulate the price of milk produced and sold intrastate—Mr. Chief Justice Stone, speaking for the Court, said at page 118:

* * * Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce, *United States v. Rock Royal Cooperative*, *supra*, and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.

See *McCulloch v. Maryland*, 4 Wheat. 316, 421; *United States v. Ferger*, 250 U. S. 199; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 221; *United States v. Darby*, 312 U. S. 100, 118-19. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Familiar examples are the Congressional power over commodities inextricably commingled, some of which are moving interstate and some intrastate, see *United States v. New York Central R. Co.*, 272 U. S. 457, 464; the power to regulate safety appliances on railroad cars, whether moving interstate or intrastate, *Southern Ry. Co. v. United States*, 222 U. S. 20; the power to control intrastate rates of a common carrier which affect adversely federal regulation of the performance of its functions as an interstate carrier, *Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U. S. 563; the regulation by the Tobacco Inspection Act of tobacco produced intrastate and destined to consumers within the state as well as without, *Currin v. Wallace*, 306 U. S. 1; the regulation of both interstate and intrastate marketing of

tobacco under the Agricultural Adjustment Act, *Mulford v. Smith*, 307 U. S. 38, 47; and see cases collected and discussed in *United States v. Darby*, 312 U. S. 100, 118–125.

And again at page 121:

It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular persons conducting the intrastate activities is, or not, also engaged in interstate commerce. See *Chicago Board of Trade v. Olsen*, 262 U. S. 1; *Stevens Co. v. Foster & Kleiser Co.*, *supra*. It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power. *Second, Employers' Liability Cases*, 223 U. S. 1, 51. We conclude that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to affect adversely the Congressional regulation.

Again, in *North America Company v. Securities & Exchange Commission*, 327 U. S. 686 (1946)—a case involving orders entered by the Securities & Exchange Commission requiring North American to sever relationship with certain of its other properties—the Su-

preme Court said, speaking through Mr. Justice Black, at page 705:

This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress deems inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co. v. United States*, 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

We need not attempt here to draw the outer limits of this plenary power. It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature. *Brooks v. United States*, 267 U. S. 432, 436-437. This power permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce. Congress thus has power to make direct assault upon such economic evils as those relating to labor relations, *Labor Board v. Jones & Laughlin Corp.*, 301 U. S. 1; *Polish Alliance v. Labor Board*, 322 U. S. 643; to wages and hours, *United*

States v. Darby, supra; to market transactions, *Stafford v. Wallace*, 258 U. S. 495; *Chicago Board of Trade v. Olsen*, 262 U. S. 1; and to monopolistic practices, *Northern Securities Co. v. United States, supra*. The fact that an evil may involve a corporation's financial practices, its business structure or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil. Once it is established that the evil concerns or affects commerce in more states than one, Congress may act. "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." *In re Rahrer*, 140 U. S. 545, 562.

Congress in § 11 (b) (1) of the Public Utility Holding Company Act was concerned with the economic evils resulting from uncoordinated and unintegrated public utility holding company systems. These evils were found to be polluting the channels of interstate commerce and to take the form of transactions occurring in and concerning more states than one. Congress also found that the national welfare was thereby harmed, as well as the interests of investors and consumers. These evils, moreover, were traceable in large part to the nature and extent of the securities owned by the holding companies. Congress therefore had power under the commerce clause to attempt to remove those evils by ordering the holding companies to divest themselves of the securities that made such evils possible.

That Congress has the power to enact laws which affect articles held for sale after having completed their journey in interstate commerce has been decided by the United States Supreme Court in *United States v. Sullivan*, 332 U. S. 689 (1947). This case involves Section 301 (k) of the Federal Food, Drug and Cosmetic Act of 1938, which prohibits "the doing of any * * * act with respect to, a * * * drug * * * if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."

Briefly, the facts in this case are as follows:

A laboratory had shipped in interstate commerce to a consignee in Atlanta, Georgia, a number of bottles, each containing 1,000 sulfathiazole tablets. These bottles were properly labeled as required by Section 502 (f) (1) and (2) of the Act. A druggist purchased one of these properly labeled bottles from the consignee in Atlanta, transferred the bottle to his store in Columbus, Georgia, and there held the tablets for resale. On two occasions, 12 tablets were removed from the properly labeled and branded bottle, placed in pill boxes and sold to customers. The pill boxes were labeled "sulfathiozole" but did not contain the statutorily required adequate directions for use or warnings of danger. The druggist was indicted, convicted in the Federal District Court (67 F. Supp. 192) of violating Section 301 (k) of the Act. The Court of Appeals reversed (161 F. 2d 629) and upon certiorari the Supreme Court reversed the United States Court of Appeals.

After discussing the narrow interpretation which the Court of Appeals thought necessary to give to Section 301 (k) and noting the cases relied upon by the Court,¹² the Supreme Court said at page 693:

A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity. Although criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see *Kraus & Bros., Inc., v. United States*, 327 U. S. 614, 621-622, even in determining whether such statutes meet that test, they should be given their fair meaning in accord with the evident intent of Congress. *United States v. Raynor*, 302 U. S. 540, 552.

¹² *Federal Trade Commission v. Bunte Bros.*, 212 U. S. 349; *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; and *Schechter Poultry Corp. v. United States*, 295 U. S. 495. This last case is among the cases relied upon and cited by petitioners in the instant matter. (Br. 12, 19).

The Court went on further to say, at page 695:

When we seek the meaning of § 301 (k) from its language we find that the offense it creates and which is here charged requires the doing of some act with respect to a drug (1) which results in its being misbranded, (2) while the article is held for sale “after shipment in interstate commerce.” Respondent has not seriously contended that the “misbranded” portion of § 301 (k) is ambiguous. Section 502 (f), as has been seen, provides that a drug is misbranded unless the labeling contains adequate directions and adequate warnings. The labeling here did not contain the information which § 502 (f) requires. There is a suggestion here that, although alteration, mutilation, destruction, or obliteration of the bottle label would have been a “misbranding,” transferring the pills to non-branded boxes would not have been, so long as the labeling on the empty bottle was not disturbed. Such an argument cannot be so sustained. For the chief purpose of forbidding the destruction of the label is to keep it intact for the information and protection of the consumer. That purpose would be frustrated when the pills the consumer buys are not labeled as required, whether the label has been torn from the original container or the pills have been transferred from it to a non-labeled one. We find no ambiguity in the misbranding language of the Act.

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Given the meaning that we have found the literal language of § 301 (k) to have, it is thoroughly consistent with the general aims and purposes of the Act. For the Act as a

whole was designed primarily to protect consumers from dangerous products. This Court so recognized in *United States v. Dotterweich*, 320 U. S. 277, 282, after reviewing the House and Senate Committee Reports on the bill that became law. Its purpose was to safeguard the consumer by applying the Act to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer. Section 301 (a) forbids the "introduction or delivery for introduction into interstate commerce" of misbranded or adulterated drugs; § 301 (b) forbids the misbranding or adulteration of drugs while "in interstate commerce" of any misbranded or adulterated drug, and "the delivery or proffered delivery thereof for pay or otherwise." But these three paragraphs alone would not supply protection all the way to the consumer. The words of paragraph (k) "while such article is held for sale after shipment in interstate commerce" apparently were designed to fill this gap and to extend the Act's coverage to every article that had gone through interstate commerce until it finally reached the ultimate consumer. Doubtless it was this purpose to insure federal protection until the very moment the articles passed into the hands of the consumer by way of an intrastate transaction that moved the House Committee on Interstate and Foreign Commerce to report on this section of the Act as follows: "In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so

as to misbrand articles held for sale after interstate shipment.” We hold that § 301 (k) prohibits the misbranding charged in the information.

The decision of the Supreme Court in the *Sullivan* case is controlling in the instant matter and this Court could very well sustain the order to cease and desist under the principles of law therein discussed.

The primary purpose of the Fur Products Labeling Act, just as is the purpose of the Food and Drug Act, is to protect the ultimate consumer from acts and practices which Congress determined were detrimental to the public welfare. Section 3 (a) and (b) and Section 4 and Section 5 of the Fur Products Labeling Act are analogous, in their particular field, to the Sections of the Food and Drug Act discussed by the Supreme Court in the *Sullivan* case. Both acts make unlawful certain acts and practices when committed in the sale to the ultimate consumer of a product which was at one time transported in interstate commerce.

The power may be exercised, as it has in this case, to protect the public from unfair methods of competition and unfair and deceptive acts and practices by the use of false, deceptive and misleading advertisements either in interstate commerce or intrastate commerce. The method selected by Congress to effect this purpose is a matter of legislative discretion not subject to attack if reasonably related to the end sought. Congress could have elected to absolutely prohibit the shipment in commerce of fur or fur

products, and the Courts would not question the method selected.

Congress may exercise its power generally without regard to the effect of forbidden acts in particular cases, *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 677-678 (C. A. 3, 1939), cert. denied 308 U. S. 625 (1940). Congress having the right to put a stop to a particular evil, may enact such broad prohibitions as it deems necessary to accomplish its purpose, *Carolene Products Co. v. United States*, 323 U. S. 18, 23, 27-32 (1944); *Jacob Ruppert v. Caffey*, 251 U. S. 264, 282-283 (1920).

This Court has held that there is no "constitutional right to disseminate false advertisements by the United States mails or by any means in commerce, or by any means for the purpose of inducing or which is likely to induce directly or indirectly" the purchase of a product in commerce. *American Medicinal Products v. Federal Trade Commission*, 136 F. 2d 426, 427 (C. A. 9, 1943). This decision, protecting the interstate purchaser of any product from false, misleading and deceptive advertising, was made under the provisions of the Federal Trade Commission Act. Congress in enacting the Fur Products Labeling Act has extended this same protection, under certain stated conditions, to the purchaser of fur products at the local level.

The evil which existed in interstate commerce and which Congress attempted to control by enacting the Federal Trade Commission Act may, if used in intrastate, operate directly to restrain interstate commerce

and affect the welfare and economy of the nation, thus undoing what Congress hoped to accomplish by the Federal Trade Commission Act. Due to the widespread evil that existed in intrastate commerce of “furs” and “fur products,” Congress deemed it essentially necessary to outlaw the evil by enacting the Fur Act in order to protect interstate commerce. “In interpreting statutes of this character, and, generally any legislation which aims to carry into effect the plenary powers of the Congress to regulate commerce, it is accepted constitutional doctrine that the power to control is not destroyed by the mere fact that purely intrastate activities may also be reached,” *United States v. Standard Oil Co. of California, et al.*, 78 F. Supp. 850, 873 (D. C. S. D. Cal. Cent. Div., 1948).

It is therefore submitted that under its power to regulate commerce, Congress can, when it deems it necessary, reach down to the local level and make unlawful certain acts and practices which affect interstate commerce and are detrimental to the welfare and economy of the nation.

This brings us to a consideration of the legality of Rule 44 of the Rules and Regulations under the Fur Act.

2. Rule 44 of the Rules and Regulations under the Fur Products Labeling Act is within the rule-making authority conferred upon the Commission by the Act

Relying (Br. 22-28) on a strict application of the *ejusdem generes* principle of statutory interpretation when applied to Section 5 (a) (5) of the Fur Act and citing (Br. 12) *State v. Thomas*, 232 P. 2d 87 (S. Ct.

Washington, 1950), and *Smith v. Higginbotham*, 48 A. 2d 754 (C. A. Md., 1946)—erroneously cited as 28 A. 2d—petitioners contend that in promulgating Rule 44 of the Rules and Regulations under the Fur Products Labeling Act, the Commission exceeded the authority conferred upon it by the Act. In the argument here petitioners ignore entirely other principles of statutory interpretation which, under certain circumstances, makes ineffective and inoperative the rule of *ejusdem generes*.

Ejusdem generes literally means the same kind of species. Where in a statute general words follow designation of a particular subject or class, the meaning of the general words are ordinarily presumed to be, and construed as, restricted by the particular designation and as including only things and persons of the same kind, class, character or nature as those specifically enumerated.

In *Danciger v. Cooley*, 248 U. S. 319 (1919), the Court said, at page 326:

The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is invoked in this connection, but it is far from being of universal application, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it. *United States v. Mescall*, 215 U. S. 26.

And in *Texas, et al. v. United States, et al.*, 292 U. S. 522, 534 (1934), the Supreme Court pointed out that

The rule of *ejusdem generes* is applied as an aid in ascertaining the intention of the legislation, and not to subvert it when ascertained.

Again, in *United States v. Gilliland*, 312 U. S. 86, 92 (1941), the Court said:

The rule of *ejusdem generes* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording safeguards.

In *Bridges v. United States*, 199 Fd. 2d 811 (C. A. 9, 1952)—a case in which the appellants sought to have the rule of *ejusdem generes* applied to certain provisions of the Nationality Act of 1940—this Court said at page 820:

We pass this contention by quoting *United States v. Gilliland*, 1941, 312 U. S. 86, 92, 61 S. Ct. 518, 522, 85 L. Ed. 598: "The rule of '*ejusdem generes*' is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained."

The primary rule of statutory interpretation is to first ascertain the legislative intent—in fact, it has been frequently stated, in effect, that the intention of the legislature constitutes the law and is "the vital heart, soul and essence of the law, and the guiding star in the interpretation thereof."

In the interpretation of a statute the legislative will or intent is the all important and controlling

factor. *United States v. N. E. Rosenblum Truck Line*, 315 U. S. 50, 53 (1941); *United States v. Cooper Corporation, et al.*, 312 U. S. 600, 605, (1941). Once this has been ascertained, the Courts should make such intention effective to its fullest degree and not adopt a construction that would nullify or defeat the intention of the legislature. *Helvering v. Stockholmes Enskilva Bank*, 293 U. S. 284.

The Supreme Court has also held that a statute should be read in such a way as to carry out the Congressional intention, despite a contrary literal meaning, especially in order to avoid unconstitutionality, *Markham v. Cabell*, 326 U. S. 404, 409 (1945), and “if the plain meaning of the words used in a statute produces an unreasonable, absurd or futile result, plainly at variance with the policy of the legislation as a whole, the Courts may follow the purpose of the statute rather than its literal words.” *R. E. Schanzer, Inc. v. Bowles, Price Administrator*, 141 F. 2d 262, 264 (U. S. Emergency C. A. 1944).

The principle of this legislation is not new. It is part of the growing body of legislation designed to protect the consuming public in the fields of foods, drugs, cosmetics, weights, measures and clothing.

The stated purpose of the Fur Act is: “AN ACT To protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs.” The phrase “false advertising” is not qualified and envisions and encompasses all types of false advertisements of fur products and furs.

Section 5 (a) is under the title “FALSE ADVERTISING AND INVOICING OF FUR PRODUCTS AND FURS.” Here also the phrase “false advertising” is not qualified and it also encompasses and envisions all types of false advertisements of fur products and furs.

Section 5 (a) declares:

For the purposes of this Act ¹³ a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such product or fur—

* * * * *

which “does not show” the matters and facts set forth in subsections (1), (2), (3), (4), and (6). These sections deal with the physical and zoological characteristics of fur products and furs.

Subsection (5) of Section 5 (a) is as follows:

or contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur.

Under the provisions of Section 8 (b) of the Act, the Commission, relying upon the language “or contains any form of misrepresentation or deception, directly or by implication with respect to such fur

¹³ One of the purposes stated by Congress being to protect the consumer from all forms of false advertising of fur products and furs.

product or fur” appearing in subsection (5) of Section 5 (a), promulgated Rule 44 of the Rules and Regulations under the Fur Products Labeling Act. This Rule is concerned with prices and values and is entitled “Misrepresentation of Prices.”

The specific question, therefore, here to be determined is, Did Congress in passing the Fur Act intend to make unlawful all false and misleading advertisements concerned with prices and values of fur products, even though the language used in the sections relating to false advertisements of fur products or furs (Section 5 (a)) does not specifically mention prices or values? In examining the language used in Section 5 (a), particularly in subsection (5) of this Section, to ascertain and determine if Congress intended to include false advertising as to prices and values, it is interesting to note that in the *Higginbothom* case (48 A. 2d 754), cited by petitioners in support of the strict application of the principle of *ejusdem generes*, the Court said at page 759:

It is a cardinal rule of statutory construction that the intention of the legislature should be sought in the first instance in the words of the statute. Where the language is clear and free from doubt, the Court has no power to evade it by forced and unreasonable construction in order to assert its own ideas of policy or morals. The Court has no right to sit in judgment upon the wisdom of the legislature, to pass upon the expediency of the law. * * * the meaning of the plainest words in the statute may be controlled by the context. If a word is fairly susceptible of more than one inter-

pretation, the Court should seek the legislative intention by considering the cause or necessity of enactment and the mischief it was intended to remedy and adopt the meaning which will harmonize with the general scheme of the statute and assist in carrying out the legislative purpose. * * * The real intent when ascertained, will also prevail over the literal sense of the language, because both the canons of verbal criticism and the rules of grammatical construction must alike yield to the manifest spirit and intent of an enactment.

Let us now examine the language and the grammatical construction of subsection (5) of Section 5 (a) in relation to the other subsections of Section 5 (a) and see if Congress intended that a fur product or fur shall also "be falsely or deceptively advertised" if the advertisement contains any misrepresentations as to prices or values.

It will be noted that subsections (1) through (4) and subsection (6) have to do with the zoological or physical characteristics of fur products and furs and declares that an advertisement which "does not show" those characteristics is considered to be falsely or deceptively advertised. The subject matter of subsection (5) is entirely different from that of the other subsections. It is concerned, not with failure to disclose, but with whether such advertising contains something other than the matters required to be disclosed by the other subsections. Subsection (5) represents an independent thought on the part of Congress and is particularly significant in relation to the question here raised. This subject matter is not

related to or part of the class or things (physical or zoological characteristics of fur products or furs), the subject matter of the other subsections of this Section. The two phrases "name of animal or animals, etc." and "any form of misrepresentation, etc." definitely remove this subsection from the class of things specified in the other subsections. The issue here raised therefore is concerned only with interpreting the meaning of the language used in subsection (5) of Section 5 (a) separate and apart from, and not in relation to the other subsections of Section 5 (a).

Section 5 (a) contains an incomplete conditional or "if" clause, viz, "if any advertisements, representations, etc." When read with any one of the six numbered subsections immediately following, this clause becomes grammatically complete. Each one of the subsections under Section 5 (a) independently provides a predicate for the incomplete clause in Section 5 (a). The predicate supplied by subsection (5) is a *compound*, made up of two separate parts, namely, (1) "contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection" and (2) "contains any form of misrepresentation or deception directly or by implication, with respect to such fur product or fur," whose equality of rank within the thought expressed by the complete clause is signified by the co-ordinating conjunction "or," which connects them, and the fact that the word "contains" is used twice, as a verb for each of these two separate elements of the predicate.

Giving to Section 5 (a) when read with subsection (5) its normal grammatical construction and to the words used their plain, normal meaning, we submit that the principle of *ejusdem generes* is not applicable here.

That by the use of the phrase "or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur" Congress intended to outlaw misrepresentation of price and of value of fur products and furs to the same extent as it outlawed advertisements which failed to show or disclose the matters set forth in the other subsections of Section 5 (a) is supported by the legislative history of the Act.

At a hearing held before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 2nd Session, on H. R. 3734, Mr. O'Hara, sponsor of the Fur Act, inserted in the record (pp. 141-146) of the hearing numerous advertisements which appeared in newspapers published in Chicago, Illinois. These advertisements are startling in their similarity to petitions' advertisements appearing in the record of this case as Commission's Exhibits (Tr. R. 136-142). These advertisements make representations as to prices and savings, containing among others the following representations: "Here Are The Greatest Clearance Values Ever Offered On Fur Coats.," "Don't Miss This Rare Opportunity To Get The Fur of Your Lifetime At an Undreamed Of Price." and "Values Like These May Never Again Be Available At So Low a Price."

At a hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, on May 11, 1949, Congressman O'Hara made the following statement:

I might say that the purpose and intent of this legislation is to encourage and to bring about better business practices in all branches of the fur industry so as to provide the consumer with reasonable protection against unfair trade practices.

I believe that it is highly desirable that this legislation should be passed, protecting the consumer, retailers, distributors, processors, dealers and producers from misnaming, misbranding, and deceptive or misleading advertising of fur and fur articles. (Report of hearings on H. R. 97 and H. R. 3755, before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, 1st session, p. 37.)

A representative of the Federal Trade Commission at a hearing before this same Committee, Thursday, May 12, 1949, in speaking of "Trade Practice Rules for the Fur Industry" as promulgated by the Commission June 17, 1938, had this to say:

The shortcomings on those Rules are the same type of shortcomings that apply to the Federal Trade Commission Act in respect to the problems that are involved in this proposed legislation; namely, that the greatest evil in the situation that is sought to be corrected takes place at the point of ultimate sale to the consumer, where it is very damaging in its effect.

Now, that sale in and of itself is generally in intrastate commerce, subsequently beyond the reach, the prompt reach at least of the jurisdiction of the Federal Trade Commission.

Labeling, as I pointed out yesterday, will, in my opinion, thoroughly reach it. It has proved that it could be reached in other instances by the labeling process. (Report of hearings on H. R. 97 and H. R. 3755, before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress 1st session pp. 55-56.)

The representative of the Commission was speaking of the Wool Products Labeling Act.

At a hearing held before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, 1st session, on H. R. 97 and H. R. 3755 (Report p. 194), Mr. Sadowski called the attention of the Committee to an item published by a fur merchant of Chicago, Illinois. It was an apology for some of the advertisements which were inserted in the record by Mr. O'Hara at a hearing before the Committee on April 7, 1948 (*supra*, p. 46).

Mr. Charles Gold, General Counsel, Master Furriers Guild of America, was testifying before the Committee at this time. Mr. Gold said that his organization has endeavored to stop that type of false claims of savings and have challenged them, criticised them, and have denounced them and that he now denounced them. Mr. Gold pointed out that Rule 29 of the Trade Practice Rules of the Fur Industry has condemned such advertisements, and that he did

not understand why this legislation was necessary to stop such advertisements when the Federal Trade Commission had the power to do so under Rule 29. Mr. Sadowski stated that he would ask a representative of the Federal Trade Commission, who was in the room, why the Trade Practice Rules are insufficient to protect the fur industry and the purchasers of fur from such advertisements and why the Commission thought labeling was necessary. The representative of the Commission stated that Trade Practice Rules were advisory only, of no legal effect, and although they had done much in correcting many of the practices of the fur industry, "unfortunately [the Commission is] curtailed, through jurisdictional limitations in reaching some of the worse offenders. That is our main reason for supporting supplemental legislation of this particular type." (Report of hearings on H. R. 97 and H. R. 3755, before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, 1st session, pp. 194-200.)

In a report submitted to the Senate from the Committee on Interstate and Foreign Commerce on February 5, 1951, the following statement appears:

This bill has a twofold purpose: (1) To protect consumers and scrupulous merchants against deception and unfair competition resulting from the misbranding, false or deceptive advertising or false invoicing of fur products and furs, and (2) to protect our domestic fur producers against unfair competition. (Report No. 78, 82d Congress, 1st session, Cal. No. 80.)

At a hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, on H. R. 2321, Mr. O'Hara made the following statement:

The abuses which this bill aims to cure are very widespread. Attempts to eliminate these abuses under the Federal Trade Commission Act itself have failed. The Interstate and Foreign Commerce Committee of the House was unanimous in the belief that legislation is required to protect consumers of furs and fur products, and that in this case the pattern set so successfully by the Wool Products Labeling Act should be followed.

The effect of this bill will be to require honest, fair labeling and honest advertising, and will afford protection of a very substantial character, not only to the buying public but also to the industry and trades engaged in the fur business. * * * This legislation is imperative to make it possible to adequately reach the evil in question. (Report of Hearings on H. R. 2321, before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, p. 14.)

At a hearing held before this same Committee on April 20, 1951, a representative of the Federal Trade Commission made this statement:

Mr. Gold has referred to the flood of comparative price advertising and of our ability or lack of ability to handle comparative price cases. Those are probably the most difficult types of case to prosecute in the realm of false advertising. Where a merchant offers a product which he says is reduced from \$500 to \$250, what does

that mean? That means that that man had that article or his flood at \$500 and it was offered there for \$500 and he now has reduced it to \$250 * * *.

Under the trade practice rules, Mr. Gold said he is very much in favor of our making those rules do what is intended in this bill. That is all well and good, but if there is no legal authority to do it, neither Mr. Gold nor his clients can do it, nor can we. All we can do is to get out some platitudes which are never effective against the unscrupulous merchants. (Report of hearings on H. R. 2321, before the Committee on Interstate and Foreign Commerce, House of Representatives, 82d Congress, 1st session, p. 161.)

From the above it is clear that Congress, in enacting the Fur Act, had before it for consideration advertisements containing false and misleading representations as to prices and values of fur products and furs. The failure of the Act to specifically refer to such misrepresentations is not here controlling. As the Commission in its opinion pointed out:

“[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.” *Barr v. United States*, 324 U. S. 83, 90 (1945). Furthermore, statutory expressions are to be broadly construed within the limitations of their literal meaning and the ascertainable legislative intent. The plain meaning of the statute will prevail as long as it does not lead to absurd results or clash with

policy behind the legislation. *U. S. v. American Trucking Associations, Inc.*, 310 U. S. 533, 543 (1940).

In the circumstances here, moreover, we are convinced that the Congress' goal was a legislative solution of the fur industry's major problems, including that of deceptive pricing representations and that, when enacting the legislation, its intention was to proscribe all deceptive advertising practices in connection with the sale of fur articles. (Tr. R. pp. 66, 67.)

Evidence introduced at the hearings on this bill discloses that misrepresentation of prices and values occurred in the same advertisements which contained misrepresentations as to the physical and zoological characteristics of the fur product or fur. This mischief was rampant at the local or intrastate level and was affecting the economy and welfare of the Nation. It was an evil, as the legislative history indicates, which caused those who were interested to introduce in Congress the Fur Act. Misrepresentations as to prices and values are just as serious, if not more so, as misrepresentations of physical or zoological characteristics of the product.

The purchaser of a fur coat is as interested in its price and value as in the name of the fur used for its manufacture. The purchaser is "price and value conscious" to the same degree as "~~price~~^{fur} conscious" and is just as gullible in both instances. Misrepresentation as to prices and values of fur coats and misrepresentations as to the furs used to produce the coat

usually appear in the same advertisement. The average purchaser of a fur coat is wholly ignorant not only of values but of furs, knowing nothing of either, is easily deceived by both. Fur advertising of the type here involved is perhaps, with one exception: drugs, the most reprehensible form of advertising to which the public is subjected. It would be inconceivable that Congress intended only to stop one of these evils as petitioners are here trying to have this Court decide. To hold that Rule 44 is beyond the authority of the Commission for the reason that Congress did not intend to stop the evil of misrepresentation as to the price and value would almost totally destroy the value of this piece of legislation. The Commission interpreted this Act, particularly subsection (5) of Section 5 (a) thereof, to outlaw price misrepresentation. This interpretation by the Commission is entitled to great weight, *Unemployment Compensation Commission of Alaska, et al. v. Aragon, et al.*, 329 U. S. 143, 153 (1946), and resulted in Rule 44 of the Rules and Regulations under the Fur Products Labeling Act. Since the effective date of this Rule, the Commission has issued 28 complaints, involving this Rule, all resulting in orders to cease and desist (Apdx. p. 63).

Based upon this interpretation, the Commission acting under the authority of Section 8 (b) of the Act promulgated Rule 44 of the Rules and Regulations under the Fur Products Labeling Act. In promulgating this Rule, the Commission was acting in its quasi legislative capacity and Rule 44, together

with all other Rules promulgated under the Act, is a valid, substantive regulation with the full force and effect of the statute itself. *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co., et al* 284 U. S. 370, 386 (1931).

We submit that from the stated purpose of the Act, from the use of the unqualified phrase "false advertising" in the title to Section 3 and Section 5 (a), from the unambiguous language used in the second part of the compound predicate of subsection (5) of Section 5 (a) and from the legislative history Congress intended to and did declare that a fur product or fur shall be considered falsely or deceptively advertised if any advertisement contains a misrepresentation as to prices and values. Any other interpretation or construction of the Fur Act would lead to absurd, futile and ridiculous results plainly at variance with the purpose of the legislation as a whole.

IV. CONCLUSION

It is submitted that the Commission's findings as to the facts are fully supported by the record and that its order to cease and desist was properly issued. The Commission, therefore, prays that the petition for review be dismissed and that the Court affirm the Com

mission's order, and, pursuant to statute,¹⁴ command petitioners to obey such order and comply therewith.
Respectfully submitted.

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¹⁴ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5 (c), 52 Stat. 113, 15 U. S. C. 45 (c).

SUPPLEMENTAL APPENDIX

APPENDIX

PERTINENT PROVISIONS OF THE FUR PRODUCTS LABELING ACT

MISBRANDING, FALSE ADVERTISING, AND INVOICING DECLARED UNLAWFUL

SEC. 3. (a) The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(65 Stat. 175; 15 U. S. C. § 69a)

MISBRANDED FUR PRODUCTS

SEC. 4. For the purposes of this Act, a fur product shall be considered to be misbranded—

(1) if it is falsely or deceptively labeled or otherwise falsely or deceptively identified, or the label contains any form of misrepresentation or deception, directly or by implication with respect to such fur product;

(2) if there is not affixed to the fur product a label showing in words and figures plainly legible—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;

(F) the name of the country of origin of any imported furs used in the fur product;

(3) if the label required by paragraph (2) (A) of this section sets forth the name or names of an animal or animals other than the name or names provided for in such paragraph.

(65 Stat. 177; 15 U. S. C. §69b)

FALSE ADVERTISING AND INVOICING OF FUR PRODUCTS AND
FURS

SEC. 5. (a) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur—

(1) does not show the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(2) does not show that the fur is used fur or that the fur product contains used fur, when such is the fact;

(3) does not show that the fur product or fur is bleached, dyed or otherwise artificially colored fur when such is the fact;

(4) does not show that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) contains the names or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur;

(6) does not show the name of the country of origin of any imported furs or those contained in a fur product;

(b) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively invoiced—

(1) if such fur product or fur is not invoiced to show—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statements as may be required pursuant to section 7 (c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name and address of the person issuing such invoice;

(F) the name of the country of origin of any imported furs or those contained in a fur product;

(2) if such invoice contains the name or names of any animal or animals other than the name or names specified in paragraph (1) (A) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur.

(65 Stat. 178; 15 U. S. C. § 69c)

RULE 29.—Requirements in Respect to Disclosure on Label.

(a) The required information shall be set out on the label in a legible manner and in not smaller than pica or twelve (12) point type, and all parts of the required information shall be set out in letters of equal size and conspicuousness. All of the required information with respect to the fur product shall be set out on one side of the label and no other information shall appear on such side except the lot or style number and size. The other side of the label may be used to set out any non-required information which is true and non-deceptive and which is not

prohibited by the Act and Regulations, but in all cases the animal name used shall be that set out in the Name Guide.

(b) The required information may be set out in hand printing provided it conforms to the requirements of (a), and is set out in indelible ink in a clear, distinct, legible and conspicuous manner, Handwriting shall not be used in setting out any of the required information on the label. (16 CFR § 301.29)

RULE 44.—*Misrepresentation of Prices.*

(a) No person shall, with respect to a fur or fur product, advertise such fur or fur product at alleged wholesale prices or at alleged manufacturers cost or less, unless such representations are true in fact; nor shall any person advertise a fur or fur product at prices purported to be reduced from what are in fact fictitious prices, nor at a purported reduction in price when such purported reduction is in fact fictitious.

(b) No person shall, with respect to a fur or fur product, advertise such fur or fur product with comparative prices and percentage savings claims except on the basis of current market values or unless the time of such compared price is given.

(c) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being "made to sell for," being "worth" or "valued at" a certain price, or by similar statements, unless such claim or representation is true in fact.

(d) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being of a certain value or quality unless such claims or representations are true in fact.

(e) Persons making pricing claims or representations of the types described in subsections (a), (b),

(c) and (d) shall maintain full and adequate record disclosing the facts upon which such claims or representations are based.

(f) No person shall, with respect to a fur or fur product, advertise such fur or fur product by the use of an illustration which shows such fur or fur product to be a higher priced product than the one so advertised.

(g) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being "bankrupt stock," "samples," "show room models," "Hollywood Models," "Paris Models," "French Models," "Parisian Creations," "Furs Worn by Society Women," "Clearance Stock," "Auction Stock," "Stock of a business in a state of liquidation," or similar statements, unless such representations or claims are true in fact. (16 C. F. R. § 301.44).

PERTINENT PROVISIONS OF THE FEDERAL TRADE COMMISSION ACT

SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers, and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(66 Stat. 632, 15 U. S. C. 45 (a) (1), (45) (a) (6)).

**CASES INVOLVING RULE 44 (FUR PRODUCTS LABELING ACT) IN WHICH ORDERS
TO CEASE AND DESIST HAVE BEEN ISSUED BY THE COMMISSION***

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Sattler's, Inc.....	6517
N. L. Kaplan, Inc.....	6530
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*Decisions of the Commission have not been published in book form since June 30, 1954.



No. 15184

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES DE GORTER and SUZE C. DE GORTER, as individuals and as copartners trading as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITIONERS' REPLY BRIEF.

WALLEY & DAVIS,

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FILED

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FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITIONERS' REPLY BRIEF.

I.

Contested Issues.

Respondent's contention, that Points III and IV contained in Petitioners' Brief on Review present issues not raised in petitioners' appeal to the Federal Trade Commission, is not supported by the record, and is a misstatement of fact.

Petitioners' Statement of Points to Be Raised on Appeal on this review apprised respondent of the fact that these points would be raised. Respondent should have asked for inclusion, in the transcript of the record, of Petitioners' Brief on Appeal (Resp. Br. on appeal below) to support this position.

The fact that the respondent Commission did not, in its opinion in support of its Cease and Desist Order, or in the Order itself, make findings of fact or draw conclusions of law touching upon these points, does not indicate that the issues were not presented to it on the appeal below.

In petitioners' brief on appeal below (Resp. Br. on Appeal, argument 2, pp. 16-20) they argued at some length that the complaint charged that petitioners violated the provisions of the Fur Act and its rules and regulations, and that the violation of this Act and its rules constituted unfair acts and practices and unfair competition under the Federal Trade Commission Act, which latter Act was by reference made a part of the Fur Act in order to justify the issuance of a Cease and Desist Order, as distinguished from the imposition of a criminal penalty of fine or imprisonment.

Petitioners further argued therein that they did not believe that respondent Commission had authority to issue a complaint charging unfair acts and practices and unfair methods of competition in interstate commerce under the Federal Trade Commission Act, without having first promulgated rules condemning such acts and practices.

Respondent Commission may have seen fit not to pass upon these issues in view of its conclusion that Rule 44 of the Fur Act was properly promulgated which conclusion rendered unnecessary of determination the two issues referred to herein.

II.

Argument.

The preliminary statement in respondent's brief requires little comment. Petitioners have no argument with the principles of law enunciated therein and which this court is admonished to heed in determining the issues and reviewing the evidence.

Petitioners request this court to exercise only the powers which it has and which are referred to in the preliminary statement. This court is requested (1) to determine the statutory authority of the Federal Trade Commission to promulgate Rule 44 of the Fur Act; (2) to determine the intent and meaning of the provisions of the Act in the light of constitutional limitations on the authority of Congress to enact it, and (3) to determine whether there is substantial evidence, under the material allegations of the complaint, to support the findings and conclusions made by respondent Commission which would justify its Cease and Desist Order.

Petitioners' reply to respondent's brief will be brief in view of the fact that petitioners anticipated the contentions and arguments of respondent from a consideration of the respondent's briefs filed in the hearing below.

1. Petitioners Are Not Engaged in Interstate Commerce in the Sale and Distribution of Their Fur Products.

For the purpose of the argument, petitioners admit that they violated certain provisions of the Fur Act and its rules and regulations and take no issue with respondent on that score.

Petitioners in their opening brief took the position that the shipment (not the sale) in interstate commerce of 7

fur products in 1063 separate sales and deliveries of fur products, all made in intrastate transactions during a four months period of operation, does not constitute *a course of trade in interstate commerce*. Assuming that this court is disposed to accept this contention, petitioners then claim that none of their other business practices, (1) constitute the doing of business in interstate commerce, or (2) substantially affect interstate commerce carried on by others. The ensuing arguments are intended to demonstrate the merit of this position.

Since petitioners do not sell or ship or transport “fur products” in interstate channels (with the exception of the isolated shipments above referred to), and since they do not manufacture for sale, shipment or transportation or introduction into interstate commerce of “furs,” the only business practices of petitioners which might result in their being engaged in interstate commerce, or which might result in substantially affecting interstate commerce, are:

(a) The advertising of their “fur products” in newspapers of interstate circulation;

(b) The advertising, manufacture for sale, sale, transportation or distribution in purely intrastate transactions of “fur products” made of “furs” *which have been shipped and received in commerce*.

Respondent contends that insofar as it is relevant here, Section 3(a) provides, “that the advertising in interstate commerce, etc.” (Resp. Br. p. 18); petitioners submit that insofar as it is relevant here, Section 3(a) provides as follows: “the advertising or offering *for sale* in commerce.”

Respondent contends that the court cannot pick and choose bits of the evidence to justify the drawing of differ-

ent *findings of fact and conclusions of law*, and yet respondent picks language in a statute out of context to prove that what it concludes was the intention of the Congress in the passage of the Act.

Petitioners submit that they are not engaged in a play on words, but earnestly contend that under rules of statutory construction the words in a statute must be read in conjunction with the other words therein in order to arrive at the correct legislative intent and this is particularly true where the legislation is subject to constitutional limitations and as those statutes are interpreted and impressed with decisions of the Federal courts. And this is especially true where the Congress legislates respecting the commerce clause.

Petitioners earnestly urge that it is not the mere fact of advertising in interstate commerce that brings fur merchants within the purview of the Fur Act, but rather it is the *advertising for sale in commerce* which has that effect, and such was the intention of the Congress in the use of the language "the advertising or offering for sale in commerce."

Respondent contends that petitioners appear to be attacking the constitutionality of the Fur Act and that they therefore have the burden of establishing its unconstitutionality. Petitioners are not attacking the validity of the Fur Act; they are attacking the attempt on the part of respondent Commission to apply the Act in an unconstitutional manner by a misinterpretation of its clear and unambiguous language, and by a disregard of the limitations imposed upon the Congress by decisions of the Federal Courts limiting the extent to which Congress may legis-

late under the Commerce clause. Respondent admits that its conclusion that petitioners are engaged in interstate commerce is based solely upon, and we quote, “(1) petitioner’s interstate advertisements of a fur product” (Resp. Br. p. 19). Obviously its conclusion is not based upon a finding that petitioners *advertised for sale in commerce*, but, merely that they advertised.

The foregoing conclusion is not justified either on the ground (1) that petitioners are engaged in interstate commerce under the language of the Act, or (2) upon the ground that the mere fact of advertising substantially affects interstate commerce. To constitute an engagement in interstate commerce there must exist more than just the fact of advertising in a newspaper of interstate circulation. There must be an attempt *to engage in interstate commerce* through the medium of interstate advertising. In the instant case there is no evidence in the record of an engagement in interstate commerce, and certainly the mere fact of advertising, in a newspaper of interstate circulation, cannot be said to have an effect upon interstate commerce.

The cases cited by respondent, in support of its contention, that Congress’ right to legislate over purely intrastate transactions, exists whenever these purely intrastate activities affect interstate commerce, have no application to the facts of the instant case.

Respondent in its brief at page 28 refers to numerous cases and examples indicating Congress’ authority to legislate over purely intrastate transactions. Respondent says, “Familiar examples are the Congressional power over commodities *inextricably commingled, some of which are*

moving interstate and intrastate.” The cases and examples as indicated in its brief involve, railroad car appliances, sales of milk, sales of tobacco, all commingled in both interstate and intrastate movement.

Labor relations, market transactions and corporate financial practices are subject to Congressional legislation, “once it is established that the evil concerns or affects commerce in more states than one” (Resp. Br. pp. 30-31).

How can it be said with any merit that the mere fact of advertising of a “fur product” in a newspaper of interstate circulation, which fur product is subsequently sold in a purely intrastate transaction, has the tendency or ability to “affect commerce in more states than one” or that such “fur product” so advertised is, “inextricably commingled with other fur products which are in interstate commerce or moving in interstate channels”?

The other business practices engaged in by petitioners, which might submit them to the jurisdiction of the Federal Trade Commission under the Fur Act, are the sale, advertising, transportation and distribution of “fur products” in purely intrastate transactions. However, the jurisdiction of the Commission can only extend to these business practices if the “fur product” is made of “*furs*” *which have been shipped and received in commerce.*

Petitioners in their opening brief argue that the Congress intended to extend the coverage of the Fur Act as far as it was constitutionally able to do, but since the authority of the Congress to legislate, with respect to the commerce clause, is limited by the “goods come to rest” principle laid down by the courts, it could not provide that a “*fur product*” *shipped and received in commerce* con-

tinued to be subject to Federal regulation after receipt and commingling with other goods in the state of its destination.

For this reason, petitioners argued, Congress provided that “fur products” which were made of *furs which had been shipped and received in commerce*, continue to be a subject of interstate commerce even after arrival and commingling at its destination.

Respondent Commission, in its attempt to disparage this argument and reasoning, refers to statements made by various proponents of the measure while it was before the Congress for consideration. Petitioners submit that the interpretation of the language of Congressional or any legislation, which may be given it by its sponsors and proponents cannot, under our system of separation of powers, deprive the court of its authority to place a different interpretation upon the language or to apply the legislation in a constitutional manner so long as such interpretation and application do not do violence to the language of the Statute.

The statements of proponents of the Fur Act do not lend as much support to respondent's position as respondent would have this court believe. The statement made by Senator Lodge (Resp. Br. p. 24) indicates that he sought to delete from the pending legislation certain language which gave the Federal Trade Commission too much control and which affected the fur merchant too adversely. In the quotation contained in respondents brief, Senator Lodge indicates that the proposed amendment to the original bill would not weaken the protection to the consumer and would afford the retailer an important right.

The statement, made by Representative O'Hara (Resp. Br. p. 25), recognizes the limitations surrounding Congress' right to legislate concerning interstate commerce, yet, respondent argues, that Congress has unlimited power to legislate over the commerce clause (Resp. Br. p. 36). Such pronouncements made by respondent as, and we quote,

“the power can be exercised, as it has in this case, to protect the public from unfair methods of competition . . . in interstate commerce or intrastate commerce. The method selected by Congress to effect this purpose is a matter of legislative discretion not subject to attack if reasonably related to the end sought” (Resp. Br. p. 36).

are not supported by the cases cited in its brief. Those cases sanction the right of Congress to legislate respecting intrastate transactions if they are so commingled with interstate ones as to affect commerce or if they otherwise substantially affect interstate commerce.

Respondent Commission leans heavily upon the decision of the Supreme Court in *United States v. Sullivan*, in support of its contention that Congress may control purely intrastate transactions without any qualifications (Resp. Br. pp. 33-36).

Three things stand out in the facts and decision of the *Sullivan* case which distinguish it from the instant case. First, and perhaps least important, is the fact that the case involves the Food and Drug Act which controls the sale and distribution of products dangerous for human consumption if improperly branded. Second, the decision of the Court of Appeals was disaffirmed by the Supreme

Court on the ground that the Court of Appeals narrowly interpreted the language of the Act in order to avoid determining the Act's constitutionality. The Court of Appeals so construed the Act as to do violence to its clear and unambiguous language in order not to hold that the Act was unconstitutional. The language of the decision of the Supreme Court quoted in respondent's brief at page 33, so indicates.

The reversal of the judgment of conviction of the defendant by the Court of Appeals, was undoubtedly due to this error on the part of the latter court. We quote a portion of the opinion of the Supreme Court in that case,

“where it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the Congressional purpose, not even if the clearly indicated purpose makes marked deviation from custom or leads inevitably to a holding of unconstitutionality.”

More important, however, is the third distinction between the facts of that case and the facts of the instant case. Petitioners have argued here, that the “goods come to rest principle,” prevents Congress from including as a part of interstate commerce goods which have arrived at their destination and have become commingled with similar goods, unless those goods come within the exception to the rule that if such goods, upon arrival at the point of destination, are to be manufactured or otherwise processed before sale, they are still a part of interstate commerce.

Petitioners now point out that “fur products” do not come within the exception to the rule for the reason that upon arrival in the state of destination, nothing remains to be done to them before their sale in intrastate com-

merce. However, with respect to “furs,” which are to be manufactured into “fur products,” something further must be done to them before they are to be sold in intrastate commerce, and they are therefore still in interstate channels, since under the exception to the rule, they have not come to rest.

In the *Sullivan* case, the drug was received at its ultimate destination by the consignee in bottles containing 1,000 tablets, which bottles bore labels placed thereon by the shipper. The consignee, however, did not sell the drugs in the bottles, but he removed the tablets from the bottles and placed them in pill boxes prior to sale, which pill boxes were labeled differently from the bottles in which he received them. Since the drugs, after receipt by the consignee had to be processed by him before their sale in purely intrastate transactions, they could be considered as not having come to rest, and therefore still in interstate commerce.

Section 301(k) of the Food, Drug and Cosmetics Act *prohibits the doing of any act with respect to a drug* if such act is done while such article is held for sale after shipment in interstate commerce. We quote the following portion of the opinion of the Supreme Court in the *Sullivan* case:

“In order to extend protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted . . .” (Resp. Br. p. 35).

It is petitioners’ contention that the Congress intended to accomplish by Section 3(a) of the Fur Act what it sought to accomplish in Section 301(k) of the Food, Drug

and Cosmetics Act. The intention was to include in the coverage of the Act those products which, after receipt by the consignee for sale in purely intrastate transactions, required some processing before such sale, so as to come within the exception to the rule.

2. Rule 44 of the Rules and Regulations Under the Fur Products Labeling Act Is Not Within the Rule Making Authority Conferred Upon the Commission by the Act.

Petitioners have fully covered this point in their opening brief (Pet. Br. pp. 22-28), and for that reason feel it unnecessary to belabor the point at length.

Respondent refers to the opinion in the *Higginbotham* case, cited by petitioners in their opening brief, in support of its contention that the principle "*ejusdem generis*" has no application here.

Petitioners submit that the language contained in Section 5(a)(5) is *clear and free from doubt* and comes within the rule enunciated in that case and as quoted by respondent in its brief (Resp. Br. p. 43).

Subdivision (5) of Section 5(a) does not represent an independent thought disconnected from any of the other subdivisions of that Section. Subdivision (1) of Section 5(a) is definitely tied in with Subdivision (5). Subdivision (1) provides that advertising is false if it does not show the name of the animal producing the fur, while Subdivision (5) provides that the advertisement shall not show the name of any animal other than the animals specified in Subdivision (1). What the two subdivisions are intended to accomplish is to cause affected persons in advertising fur products or furs, to use the names of the

animals as they appear in the Fur Guide and to use none others.

Respondent again refers to statements made by sponsors and proponents of the Fur Act as indicating that the Act was intended to be a pricing act as well as a labeling act. The statements so referred to in no wise refer to pricing.

The only statements referred to in respondent's brief which have any reference to pricing are statements made by counsel for the Master Furriers' Guild who questions whether any legislation relative to pricing was necessary in view of the fact that in his opinion the Federal Trade Commission Act already covered the subject (Resp. Br. pp. 48-49). The only other statement relating to pricing is that made by a representative of respondent Commission, but respondent Commission's attitude with respect to required legislation does not reflect the intention of the Congress in its statutory enactments.

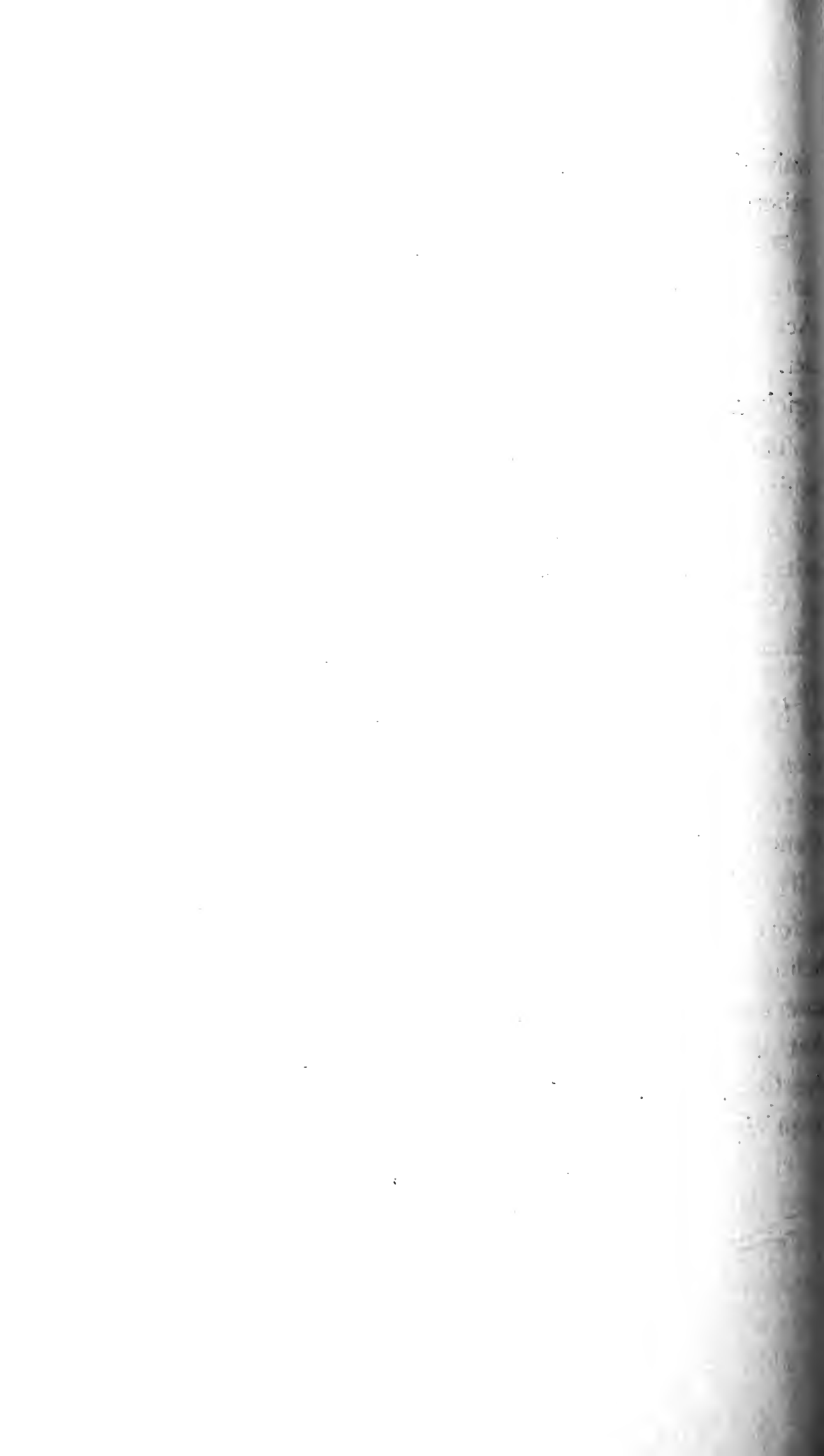
If, as respondent Commission claims, the Congress had before it, prior to its enactment of the Fur Products Labeling Act, evidence of pricing abuses committed by wholesalers and retailers in the fur business, the fact that the Act does not mention pricing in any respect, indicates that the Congress had no intention of legislating with respect to pricing insofar as the fur industry is concerned.

Respectfully submitted,

WALLEY & DAVIS,

By J. J. WALLEY,

Attorneys for Petitioners.



No. 15184

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES DE GORTER and SUZE C. DE GORTER, as individuals and as copartners, trading as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITION FOR REHEARING.

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Attorneys for Petitioners.

FILE

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PAUL P. C. BARN, C

No. 15184

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES DE GORTER and SUZE C. DE GORTER, as individuals and as copartners, trading as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITION FOR REHEARING.

To the United States Court of Appeals for the Ninth Circuit and to the Honorable Judges Thereof:

Jacques De Gorter and Suze C. De Gorter, individuals and copartners trading as Pelta Furs, petitioners in the above entitled matter, hereby respectfully petition this Court for an order granting to said petitioners a rehearing of their oral argument in their petition for a review from the cease and desist order made by respondent, Federal Trade Commission. The rehearing is requested only with respect to petitioners' contention *that respondent Commission exceeded the authority vested in it by the Congress in promulgating Rule 44 under the Fur Products Labeling Act.*

The petition for rehearing is respectfully requested upon the following grounds and for the following reasons:

1. That in attempting to ascertain *the evident Legislative intent* in the use of the word “advertising,” as contained in the Fur Products Labeling Act, this Court may have lost sight of the fact that the Act applied equally to manufacturers, wholesalers and importers, of furs (skins) as well as retailers of fur garments, and that the use of the word “advertising” did not contemplate *advertising as to pricing* since importers of skins and manufacturers and wholesalers of both skins and fur garments, do not engage in price advertising in sales campaigns directed to retailers.

2. That this Court may have overlooked the fact that the clause *that said fur product or fur is not falsely advertised or invoiced under the provisions of this Act*, is contained in Section 10 of the Fur Act entitled “Guaranty,” which Section of the Act has no connection with the pricing of fur products or furs (garments or skins).

3. That this Court may have overlooked the fact that the catchall clause “*contains any form of misrepresentation . . . with respect to such fur product or fur*,” wherever used in the Act, applies to raw skins as well as fur garments and that “misrepresentation with respect to raw skins” does not contemplate price advertising, since “raw skins” are not sold by retailers and price advertising with respect to “raw skins” is not engaged in by importers, manufacturers or wholesalers.

4. That this Court was persuaded, in arriving at its decision, more by the facts of the instant case, than by *the evident intent and purpose of the Congress*, in adopting the Act, which should be determined from a con-

sideration of the quoted language and all parts of the Act, in their relation to all classes of persons affected by it.

WHEREFORE, petitioners pray that this Court make its order granting petitioners a rehearing and further oral argument in support of their petition for review of the order to cease and desist.

Respectfully submitted,

WALLEY & DAVIS,

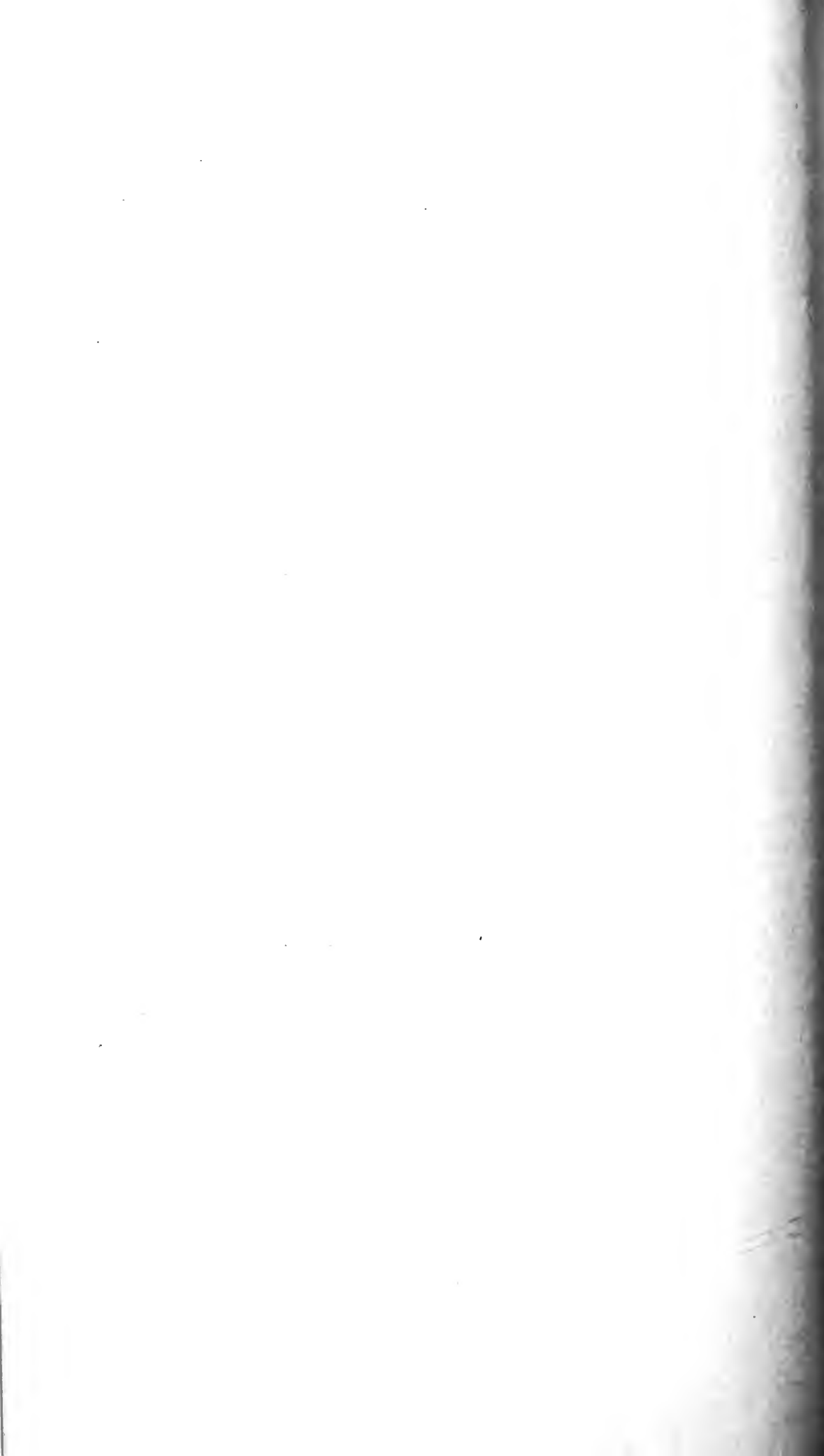
By J. J. WALLEY,

Attorneys for Petitioners.

Certificate of Counsel.

J. J. WALLEY, one of the attorneys for the petitioners in the foregoing petition for review of an order to cease and desist made by respondent, Federal Trade Commission, hereby certifies that in his opinion the grounds set forth in the foregoing petition for rehearing are well taken in law and are not interposed for the purpose of delay.

J. J. WALLEY.



No. 15,190

IN THE

United States Court of Appeals
For the Ninth Circuit

TILLMAN FOSTER ETHERTON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE.

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No. 15,190

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TILLMAN FOSTER ETHERTON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted, after a jury trial in the District Court for the District of Alaska, Third Judicial Division, at Anchorage, Alaska, the Honorable Anthony J. Dimond presiding, of violations of Section 65-9-11 ACLA 1949 and of Section 65-9-10 ACLA 1949. These Territorial felonies were alleged in four different counts of one indictment (District Court Criminal No. 2459) and in two separate counts of a second indictment (District Court Criminal No. 2461). The two indictments were consolidated for trial and trial was conducted on them as consolidated. A verdict of guilty of all counts was returned and the District Court sentenced the Appellant to a sentence of twenty years imprisonment to be served.

After a multitude of proceedings, conducted in both the District Court and in the Court of Appeals, involving various attacks on the imprisonment of the Appellant, the Appellant filed in the District Court denied the said motion and it is from such denial that the Appellant has taken his present appeal.

Jurisdiction below was conferred by 48 USCA 101. Jurisdiction in this Court is conferred by 28 USCA 1291, 2253, and 2255.

In addition to the present appeal, it would appear from pages 3 and 4 of Appellant's Appeal Brief that Appellant has also an appeal pending in the Court of Appeals from the denial by Judge Boldt of the District Court at Tacoma, Washington, of the Appellant's petition for a writ of habeas corpus. The attention of the Court of Appeals is respectfully drawn to the fact that the instant brief and proceeding has nothing to do with the appeal which the Appellant appears to have taken from proceedings conducted in the United States District Court at Tacoma, Washington.

STATEMENT OF FACTS.

Appellant's Statement of Facts, appearing on pages 2, 3, 4, and 5 of Appellant's Appeal Brief, is somewhat scanty. There follows, therefore, a recital of the facts as known by Appellee. In both this connection and in connection with the Argument portion of Appellee's Brief, Appellee has been somewhat handicapped in preparing the Brief due to the fact that the

Clerk of the District Court dispatched all the original papers of the entire case to the Court of Appeals, this being done apparently due to the fact that the Appellant was proceeding in the Court of Appeals in forma pauperis. The absence of all of the District Court's file has been a disadvantage. However, Appellee believed that the best interest of economy, of time, convenience, and money would be served by not delaying the resolution of the appeal by requesting the return to the District Court of the file.

Several of the points relied on by Appellant in his, "Designation Of Points To Be Raised On Appeal" are resolvable on a purely factual basis. As to those certain points Appellee is in dispute with Appellant and Appellee will recite in its own Statement of Facts those facts which it is believed may refute the factual basis on which rests certain of the aforesaid points of Appellant.

Here follows, then, a recital of the facts of the litigation:

The Appellant was indicted in District Court Criminal No. 2459 for contributing to the delinquency of Douglas Shaw in violation of Section 65-9-11 ACLA 1949. This was Count I of the said indictment. Count II of the said Indictment charged the Appellant with sodomy with Douglas Shaw in violation of Section 65-9-10 ACLA 1949. Count III charged that the Appellant contributed to the delinquency of Layton Lee Wiley at Anchorage, Alaska, from the period of May, 1949, to September, 1949, and Count IV charged that the Appellant contributed to the delinquency of Lay-

ton Lee Wiley at Wasilla Alaska, between June, 1950, and August, 1950. This Indictment was filed February 26, 1951.

In District Court Criminal No. 2461, defendant was charged with contributing to the delinquency of one Larry Cox between September, 1949, and June, 1950, at Anchorage, Alaska, in violation of Section 65-9-11 ACLA 1949. In Count II of this last-named Indictment he was charged between the months of September 1949, and June, 1950, at Wasilla, Alaska, with contributing to the delinquency of Larry Cox. This Indictment was February 26, 1951.

On February 27, 1951, a bench warrant was issued. The bench warrant was returned to the District Court on March 1, 1951, and on that date both the Indictments were published. Time for arraignment was set for March 2, 1951. On March 2, 1951, the Appellant was arraigned and asked at that time for the entry of plea to be continued; and the time for entry of plea was set for March 5, 1951. On March 5, 1951, the Appellant appeared with his attorney, William Renfrew, and the Appellant entered a plea of not guilty to all charges comprised in each Indictment.

The case was on March 9, 1951, set down for trial, and the time for trial was set for March 13, 1951. On March 13, 1951, the United States moved to consolidate Criminal No. 2459 and Criminal No. 2461, and on the same date the cases were consolidated. The Minute Order of the District Court showing such consolidation is found in Vol. 24, General Journal, page 29, and is as follows:

“In the District Court for the Territory of Alaska

THIRD DIVISION

No. 2459 Cr.

United States of America,

Plaintiff,

vs.

Tillman Etherton,

Defendant.

ORDER

This matter having come on for hearing upon the motion of the United States of America, plaintiff, for an order consolidating Criminal Cause No. 2461, entitling United States of America, plaintiff, vs. Tillman Etherton, defendant, with this action, Criminal Cause No. 2459, on the grounds and for the reason that the crimes charged in both indictments are similar and occurred during the same period of time and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Criminal Cause No. 2461 be consolidated for trial with Criminal Cause No. 2459.

“Signed in open Court at Anchorage, Alaska, this 13th day of March, 1951.

Anthony J. Dimond
District Judge”

On Appellant’s motion of March 13, 1951, the District Court excluded the public from the courtroom, Trial commenced March 13 and lasted through March 14, 1951, when the case went to the jury.

On March 15, 1951, the verdict was returned by the jury and at that time the Appellant appeared with his attorney, Evander Smith. The jury found the Appellant guilty of Count I, Count II, Count III and Count IV of Criminal No. 2459. The jury also found the Appellant guilty of Count I of Criminal No. 2461 and Count II of Criminal No. 2461. Time for entry of sentencing was set for March 20, 1951. The file of the District Court shows that a transcript of proceedings in connection with plea and sentencing was filed on March 24, 1951, in Criminal Nos. 2459 and 2461.

The Appellant appeared at the time of sentencing with his attorney, William Renfrew. The Court imposed sentence on Count I of two years, on Count II of ten years to run successively, on Count III of two years to run successively, and on Count IV of two years to run successively.

The Appellant also received sentence of two years on Count I and one year on Count II to run consecutively as to Count I, sentence on both counts to begin at the expiration of the sentence imposed on Count IV in Criminal No. 2459—a total of twenty years to serve.

On March 10, 1952, approximately a year after his conviction, Motion to Vacate and Set Aside Judgment and Sentence was filed by Appellant with the District Court. Appellant contended therein that he had been unlawfully sentenced and that he had been twice put in jeopardy. He contended that both Indictments al-

leged the same offense charged in Count II of the first Indictment, and he further alleged misconduct on the part of the United States Attorney. On March 14, 1952, the District Court entered a minute order denying the Motion to vacate and set aside the judgment.

On April 16, 1952, the Appellant filed a motion in the District Court for permission to appeal to the Ninth Circuit Court of Appeals from the denial of his petition in District Court. On May 8, 1952, the District Court denied his application for permission to prosecute an appeal for the reason that the District Court's permission was not necessary.

On August 12, 1952, Appellant petitioned the District Court for probation. On August 22, 1952, the District Court denied his petition for probation. On March 21, 1953, Appellant again petitioned the Court for probation.

On July 16, 1954, Appellant made an application to vacate and set aside the judgment of sentence. At this time Appellant contended that he was not prosecuted in a "United States District Court," and cited *Reese v. Fultz*, 13 Alaska 227, 96 F. Supp. 449. Appellant further contended that the Indictments were bad because the "seal" of the District Court was not proper, and that there were grounds to cause the sentence to be set aside, but the remainder of the petition is not understandable to the Appellee.

On July 22, 1954, a petition was filed in the District Court demanding a transcript of the evidence and exhibits. This petition was supported by an affidavit

in forma pauperis. On July 23, 1954, the District Court entered a minute order denying the July 16, 1954, application to vacate and set aside the judgment and sentence for the reason that a previous motion had been filed and denied. On August 5, 1954, the Appellant filed a notice of appeal in the District Court from the Court's order (of August 2). A minute order of August 5, 1955, denying the application to proceed in forma pauperis was filed. A minute order of August 26, 1955, denying motion to proceed in forma pauperis was filed.

On September 18, 1954, a minute order was entered denying the petition for appeal. The District Court file shows an application for permission to appeal in forma pauperis, dated November 1, 1954. In Miscellaneous No. 390 of the Court of Appeals, the Court of Appeals denied the application of appeal in forma pauperis. On July 14, 1955, the Appellant made a new motion to proceed in forma pauperis in the District Court. Filed also at that time was a motion for personal appearance in an application for writ of error coram nobis, to vacate and set aside the judgment and sentence of commitment. This application of the petitioner contended that the sentence was inconclusive and vague. The remainder of the application is not clear. On August 5, 1955, the District Court denied the motion to appeal in forma pauperis and the motion for the petitioner's personal appearance and for a writ of error coram nobis.

On August 23, 1955, the Appellant made an application in the District Court to proceed in forma

pauperis. This application was denied on August 26, 1955. On September 6, 1955, he made a new application to appeal in forma pauperis. On September 23, 1955, this application was heard and decision was reserved. On October 14, 1955, the District Court granted a motion for extension of time to pay filing fees of \$5.00.

On March 29, 1956, the Appellant filed in District Court an affidavit and motion to proceed in forma pauperis and also a motion to vacate and set aside the judgment and sentence of commitment and motion for personal appearance of the Appellant. The said Motion to Vacate was founded on the following four grounds:

1. The conduct of the original trial on two separate indictments without consolidation thereof.
2. The utilization of the same offense on which to found two separate counts (Appellant was here referring to Count I and Count II of District Court Criminal No. 2461).
3. Harmful consequences stated to have been suffered by Appellant due to the failure of the District Court to make the consolidation of the two indictments.
4. Incompetence of Appellant's counsel at the original trial.

On May 18, 1956, the District Court denied the said Motion to Vacate, and on June 19, 1956, denied Appellant's Motion for Leave to Proceed in Forma Pauperis. On July 6, 1956, the District Court signed

and entered in the Journal a formal order denying the previously mentioned Motion for Leave to Proceed in Forma Pauperis. Also, on July 19, 1956, the District Court denied a motion for a Certificate of Good Faith, a Motion for Habeas Corpus, and for Personal Appearance of the Appellant.

As previously stated in this Brief, the judgment appealed from in the instant Appeal is the District Court's denial of Appellant's Motion to Vacate, such denial being dated May 18, 1956. Not having the Court file at hand, Appellee is unable to state whether a formal order denying Appellant's Motion to Vacate was executed by the District Court. Appellee is of the opinion that probably there was not such a formal order made. There was, however, a minute order recorded in the District Court Journal showing the action taken by the District Court in open Court. This minute order is found in the District Court's General Journal Vol. 46 at page 100. It is quoted verbatim as follows:

“Nos. 2459 Cr. and 2461 Cr.

“HEARING ON MOTION TO PROCEED IN
FORMA PAUPERIS: MOTION TO VA-
CATE AND SET ASIDE JUDGMENT,
SENTENCE AND COMMITMENT, AND
FOR PERSONAL APPEARANCE OF DE-
FENDANT

“Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

“Now at this time Hearing on Motion to Proceed in Forma Pauperis; Motion to Vacate and Set Aside Judgment, Sentence and Commitment and For Personal Appearance of Defendant in Cause Nos. 2459 Cr., entitled United States of America, plaintiff, versus Tillman Foster Ether-ton, defendant, and 2461 Cr., entitled United States of America, plaintiff, versus Tillman Foster Etherton, defendant, came on regularly before the Court, the Government represented by James M. Fitzgerald, Assistant United States At-torney, defendant not present nor represented by counsel, the following proceedings were had, to-wit:

“Argument to the Court was had by James M. Fitzgerald, for and in behalf of the Government.

“WHEREUPON, Court having heard the ar-gument of counsel, and being fully and duly ad-vised in the premises, denied motion to proceed in forma pauperis; denied motion to Vacate and Set Aside Judgment, Sentence and Commitment; and denied motion for the Personal Appearance of the defendant.”

POINT RAISED BY APPELLANT.

(In order that the Court may more readily apprehend the several points on which the Ap-pellant appears to be relying, Appellee has under-taken to list Appellant's principal points at this place in the Brief. These points of Appellant the Appellee has gleaned from the Appellant's “Designation of Points to be Raised on Appeal” and from sources cited therein.)

1. Conduct of the original trial on two separate indictments without consolidation thereof. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

2. Utilization of the same offense on which to found two separate counts, to-wit: Count I and Count II of District Court Criminal No. 2461. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

3. Harmful consequences to Appellant due to the non-consolidation claimed above in Point No. 1. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

4. Incompetence of Appellant's counsel at the original trial. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

5. Unconstitutionality of Section 65-9-11 ACLA 1949 based on:

a. Vagueness and indefiniteness. (Proposition I on page 1 of Appellant's "Supplemental Brief", same being also captioned "Amended Brief").

b. The factor that the punishment level of the statute extends from misdemeanor to felony, cutting across the line separating the two types of criminal behavior, thus working a denial of equal protection of the law by permitting a misdemeanor level of punishment against one defendant and a felony level of punishment against another defendant. Proposition II on page 5 of Appellant's "Supplementary Brief", same being also captioned "Amended Brief").

c. The factor of unconstitutional delegation of legislative power involved in a punishment ambit

which spreads across both misdemeanor and felony areas. (Proposition III on page 12 of Appellant's "Supplementary Brief", same being also captioned "Amended Brief").

6. Non-adjudication on the merits of the Motion to Vacate denied May 18, 1956. (Ninth and tenth lines, page 4 of Appellant's Motion to Vacate denied May 18, 1956).

ARGUMENT.

I.

THE APPEAL SHOULD FAIL BECAUSE APPELLANT, AS TO EACH OF THE POINTS RAISED BY HIM ON APPEAL, IS ATTEMPTING TO MAKE A 2255 PROCEEDING PERFORM THE OFFICE OF A WRIT OF ERROR OR AN APPEAL.

Appellee's position under this Proposition is that, without exception, all of the points relied on by Appellant are matters which could, and should, have been raised by Appellant by way of writ of error or appeal and cannot be raised in a 2255 proceeding.

It is of course true that the first sentence of Section 2255 permits an attack on a sentence if the same was imposed "in violation of the constitution or laws of the United States" but by the use of such language the Congress did not at all intend to permit a defendant to "gamble on the verdict", covertly remaining silent on trial defects known by him to exist, or knowledge of which is chargeable to him, and months and years later attack the judgment and sentence on such

grounds. *Howell v. United States*, 172 F. 2d 213 makes the following observation at 215:

“Furthermore, all of Appellant’s complaints relate to matters which, if based upon fact, should have been called to the attention of the court at the trial and made the subject of timely appeal from its judgment, not raised by habeas corpus or by a motion questioning collaterally the validity of the proceedings leading to conviction. It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U. S. C. A. 2255. *Birtch v. United States*, 4 Cir., 164 F. 2d 880; *Pifer v. United States*, 4 Cir., 158 F. 2d 867; *Eury v. Huff*, 4 Cir., 141 F. 2d 554; *Sanderlin v. Smyth*, 4 Cir. 138 F. 2d 729; *United States v. Brady*, 4 Cir., 133 F. 2d 476, 481.”

It will thus be seen that when the Congress spoke in Section 2255 of sentences in violation of constitution or federal statutes the kind of constitutional travesty intended was the denial of the substance of a fair trial. Here the Appellant has, at scattered points in the documents constituting the appeal, merely claimed in general terms various general violations of his constitutional rights. Such general state-

ments, unsupported by the record, are not sufficient to vest Appellant with the right to proceed in the form of a Section 2255 action.

Furthermore, the unconstitutionality referred to in the first sentence of Section 2255 is unconstitutionality under the United States Constitution, whereas in this appeal Appellant is chiefly alleging the unconstitutionality not of a law of the United States but the unconstitutionality of a territorial statute, namely, Section 65-9-11 of ACLA 1949.

The generalization can be made that the only sort of error in a sentence which can be relied on in a 2255 proceeding is such error as would make the judgment of sentence void and subject to collateral attack. Unless objections are made at the trial they cannot be heard for the first time on appeal from an order denying a motion to vacate the sentence. *Wallace v. U. S. C. A.* 8, 1949, 174 F. 2d 112 certiorari denied 69 S. Ct. 1505, 337 U. S. 947, 93 L. Ed. 1749, rehearing denied 70 S. Ct. 30, 338 U. S. 842.

An examination of each and every one of the points raised by Appellant in this appeal will disclose that each of them could have been raised at the original trial, but was not so raised, as shown by the record. See also page 93, Footnote 63.1 to Section 2306 of 1956 Pocketpart, Barron and Holtzoff, Federal Practice and Procedure.

II.

THE MATTER URGED BY APPELLANT IS NON-APPEALABLE AND LIES WHOLLY IN THE SOUND DISCRETION OF THE DISTRICT COURT ON ACCOUNT OF THE FACT THAT THE PRESENT CLAIM FOR RELIEF IS SIMPLY A SUCCESSIVE OR REPEATED CLAIM FOR SUCH RELIEF. BUT EVEN IF IT BE CONSIDERED THAT NEW GROUNDS FOR VACATING THE SENTENCE, NEVER PREVIOUSLY URGED, ARE RAISED BY THE APPEAL, NEVERTHELESS THE MOTION TO VACATE AND THE RECORD, AND THE FILES OF THE CASE CONCLUSIVELY SHOW THE PRISONER IS NOT ENTITLED TO ANY RELIEF.

Appellee cannot state definitely and absolutely that all of the grounds relied on by Appellant in the present appeal have already, in the long history of this case, been raised and denied; but Appellant himself states in his appeal documents that he has made approximately five distinct and successive motions to vacate the sentence all of which have been denied, and therefore the probability is great that all of the grounds now raised in the instant appeal have at some time in the past been raised and disposed of. It is not possible to speak more definitely on the matter due to the fact that the entire District Court file is now in the hands of the Court of Appeals and therefore, not open to examination at Anchorage, Alaska by Appellee's counsel.

The law, however, seems to be reasonably clear that the disposition of a 2255 proceeding is entirely within the sound discretion of the trial court when the 2255 raises no new ground of attack. See footnotes 39, 39.1, and 39.2 to Section 2306, at page 107 of 1956

Pocketpart, Barron and Holtzoff, Federal Practice and Procedure.

Also, it appears to be equally well established that if the new 2255 motion *does* raise new grounds then the prisoner is entitled to no relief where the prisoner's own motion, the record, and the files of the case conclusively show the prisoner not to be entitled to any relief. For authorities, see *idem*. Appellee believes that there is just such a situation in this case.

III.

ALL OF APPELLANT'S POINTS ALLEGING FAILURE OF THE DISTRICT COURT TO CONSOLIDATE THE TWO INDICTMENTS OR BASED UPON AN ALLEGED FAILURE OF CONSOLIDATION, ARE INSUPPORTABLE ON THE FACTS.

See Points Raised by Appellant, ante, in this Brief. Two of the points raised by Appellant on this appeal, namely, Points 1 and 3 of the Points Raised by Appellant, relate to an alleged non-consolidation by the trial court of the two indictments. This is not a subject matter of law. It is matter of fact. Appellee's position is that as a matter of fact the District Court *did* consolidate the two indictments. A recital of such fact has, therefore, been included by Appellee in that portion of Appellee's Brief denominated Statement of Facts, to which the Court of Appeals is respectfully referred.

IV.

APPELLANT'S CONTENTION THAT THE TWO COUNTS COMPRISING THE ORIGINAL INDICTMENT NO. 2461 STATED THE SAME OFFENSE IS UNSOUND.

Analysis of the No. 2461 original indictment discloses that on its face the only perceivable difference between the two counts is that in Count I a crime is alleged to have been committed "at or near Anchorage" while in Count II a crime is alleged to have occurred "at or near Wasilla, Alaska".

The Court of Appeals may judicially notice that the town of Wasilla, Alaska, is geographically located approximately 45½ miles by railroad from Anchorage, Alaska, and approximately 70 miles by the highway from Anchorage.

Now it must be admitted that mere geographical separateness of the two towns would not in and of itself create separate offenses if the fact showed that the two events bore a reasonable affinity in time, and were part of a unity of action. It is universally recognized that if an individual goes into a building and therein steals property from several persons on a single occasion connected within reasonable boundaries of time, such person has not committed several larcenies but has in fact committed but one larceny from several persons. It is certainly theoretically possible for a contribution to commence in Anchorage and terminate in Wasilla, Alaska, or vice versa, and the fact that the crime took place in two different towns would not make two offenses of it. It would be in such a case but one offense.

But in this instance the factual background is not available. Appellant, of course, could have raised this point at the trial and could have presented the factual circumstances which, conceivably, might have shown that there was but one crime taking place in two cities. However, he did not do so.

There is, Appellee believes, nothing in the record to supply the factual foundation on which this question can be absolutely and definitely determined. In this connection, it also should be pointed out that the Appellant has in no way attempted to show to the Court of Appeals what facts he would adduce in order to show that there was in fact but one offense.

In this posture of the matter, an appellate court cannot do aught but look to the face of the indictment itself for a determination of whether one offense or two offenses were stated; and when the Court does look to the face of the indictment itself, it will be seen that by the allegation of situs in quo the two counts are distinct, and alleged distinct crimes, the crime of Count I occurring in a different city from that crime alleged in Count II.

V.

A 2255 PROCEEDING IS NOT THE PROPER VEHICLE WITH WHICH TO ATTACK A SENTENCE ON THE GROUND OF INCOMPETENCE OF COUNSEL. BUT IF IT WERE, THE RECORD ITSELF FURNISHES CONCLUSIVE EVIDENCE OF THE COMPETENCE OF THE APPELLANT'S COUNSEL AT THE ORIGINAL TRIAL.

Appellant believes that no more is required to support the above proposition than the mere citation of the following: *Walker v. U. S.*, CA 7, 1955, 218 F. 2d 80; *Hendrickson v. Overlade*, Dist. Ct., Ind., 1955, 131 F. 2d 561; *U. S. v. Malsetti*, Dist. Ct., New Jersey, 1954, 125 F. 2d 27, affirmed 213 F. 2d 728.

 VI.

APPELLANT ERRS IN HIS CONTENTION THAT SECTION 65-9-11 ACLA 1949 IS UNCONSTITUTIONAL.

If the Court will refer to Points Raised by Appellant, ante, it will be seen that the attack on the constitutionality of this territorial statute is based on vagueness and indefiniteness, on the factor that the punishment level embraces both the area of misdemeanor as well as the area of felony; and on the asserted unconstitutional delegation of legislative power by virtue of a punishment ambit which spreads across both misdemeanor and felony areas.

Appellee's research does not disclose that the question of the constitutionality of this territorial statute has been determined, nor has any case declaring its unconstitutionality been called to our attention.

Taking the grounds of unconstitutionality asserted by Appellant seriatim, let us first examine the question of whether the statute is vague and indefinite. A careful reading of the statute indicates that while it is broad in its inclusionary terms, it is clear and definite with respect to the type of conduct proscribed. The purpose of the statute, as is obvious, was to insulate those of tender years from harmful influences. To that end the statute prohibited any conduct which would contribute to the delinquency of a minor. In view of the legislative objective and the nature of the crime and the purpose and intent of the statute, it is difficult to perceive how any greater definiteness could have been achieved.

Appellant next urges the unconstitutionality of this statute on the ground of the denial of equal protection of the law, based on the fact that the statute would permit one person convicted thereunder to be punished as for a misdemeanor and would permit another person found guilty under the same statute to be punished therefor as for a felony. What Appellant appears to be saying is that whenever a statute prescribes certain limits of punishment it becomes invalid because one person can be punished at the minimum level of the statute while another person may be punished at the maximum level of punishment permitted by the statute. In Appellee's conception this does not create any denial of equal protection of law. Differences in actual punishment received by different persons when such punishment is administered within the established statutory limits for punishment is but an

inevitable product of the judicial process and of the function of the judge in weighing nicely all of the manifold factors which should be taken into consideration in assessing the precise quantum of punishment. If Appellant's contention was sound then thousands, nay, hundreds of thousands, of statutes would be stricken from the codes of the various states since it is quite a common legislative practice—and indeed an altogether wise and humanitarian one—to provide for each crime certain limits of minimum and maximum punishments.

Appellant is, of course, correct in his suggestion that there is a difference between misdemeanors and felonies in the law of Alaska. The statute setting forth the distinction is Section 65-2-2 ACLA 1949. The significant words of that statute are that a felony is a crime which, for our purposes, “is or *may be* punishable by imprisonment in the penitentiary”. Appellant is also correct in his assertion that there are certain harmful legal consequences to a conviction of felony. The statute which creates the suspension of civil rights during imprisonment in the penitentiary for a felony is Section 65-2-9 ACLA 1949.

However, Appellee is unable to discern any reason why the mere fact that the punishment power extends across the line separating misdemeanors from felonies is any reason for invalidity of the statute on the ground of equal protection of law.

Lastly, Appellant urges the contention that because the punishment power is spread across the line separating misdemeanors from felonies an unconstitu-

tional delegation of legislative power occur. What Appellant has overlooked is the fact that the statute does not—repeat not—give to the trial judge the determination of whether the offense is a felony or not. On the contrary, the legislature has expressly made a violation of the statute a felony. This will be seen clearly in the ninth line of the territorial statute wherein it specifies that one who has contributed to the delinquency of a minor “*shall be guilty of a felony*”. It is thus seen that the legislature has not delegated to the trial judge the determination of whether a violation of the statute is a misdemeanor or a felony because the legislature itself has pronounced the violation to be a felony. All that the legislature has done is to permit the trial judge to impose punishment in a federal jail for less than a year, if the trial judge sees fit. This does not reduce the offense to a misdemeanor. It remains, statutorily, a felony.

As stated, it is a felony by express statutory pronouncement. The only discretion vested by the legislature in the trial judge and, of course, delegated to him, is the discretion to determine the duration of the punishment up to two years. If a District Court should punish an offender under this statute by imprisonment for six months in the federal jail the act of the trial judge in so doing would not constitute the reduction of the offense to a misdemeanor. It would merely mean that the offender in question was being punished for a felony by punishment which is ordinarily accorded to misdemeanors.

VII.

WITH RESPECT TO HIS MOTION TO VACATE APPELLANT RECEIVED AS MUCH OF A HEARING ON THE MERITS AS THE LAW AND THE FACTS ENTITLED HIM TO RECEIVE.

In the minute order set forth in extenso in the Appellee's Statement of Facts, ante, the hearing held on Appellant's motion to vacate is described. It is shown by the said minute order that the United States was represented by an Assistant United States Attorney and that an argument was had and that the Court was fully advised in the premises; and that after being so advised and being fully conversant with the matter the said motion to vacate was denied.

It is true, as Appellant points out, that Appellant was not present at this hearing. However, as the Court of Appeals knows, the presence of the prisoner is not required inasmuch as Section 2255 provides as follows:

"A Court may entertain and determine such motion without requiring the production of the prisoner at the hearing".

Appellee's position on this point is simply that there was as much of a hearing as the law and facts admitted of and to the extent that they justified; and that even if no hearing had been held this appeal should fail on the basis that where the motion to vacate itself, the files and the record of the case conclusively show that the prisoner is not entitled to any relief, there is no occasion for a hearing. See the text of the 1956 Pocketpart of Barron and Holtzoff, Federal Practice and Procedure, at page 102, and the authorities collected in footnote 15 thereat.

CONCLUSION.

Appellant cannot be allowed to ameliorate what may, possibly, have been a severe sentence (as to which Appellee's present counsel is ignorant) by the selection of the wrong vehicle, in this instance, a 2255 proceeding. All of the points, separately and severally, on which Appellant relies are not only without merit but also consist of matter which could have been and should have been, raised at the trial, but which were not. Appellant was represented by competent counsel at the original trial and the fact that points in this appeal were not raised at the trial is probably some indication of their lack of merit. Appellee therefore, requests the Court of Appeals to affirm the minute order of the Court below constituting the judgment from which this appeal has been taken.

Dated, Anchorage, Alaska,
October 5, 1956.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

LLOYD L. DUGGAR,

Assistant United States Attorney,

Attorneys for Appellee.



No. 15192

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH M. BRULE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY

United States Attorney

Western District of Washington

JOHN A. ROBERTS, JR.

Assistant United States Attorney

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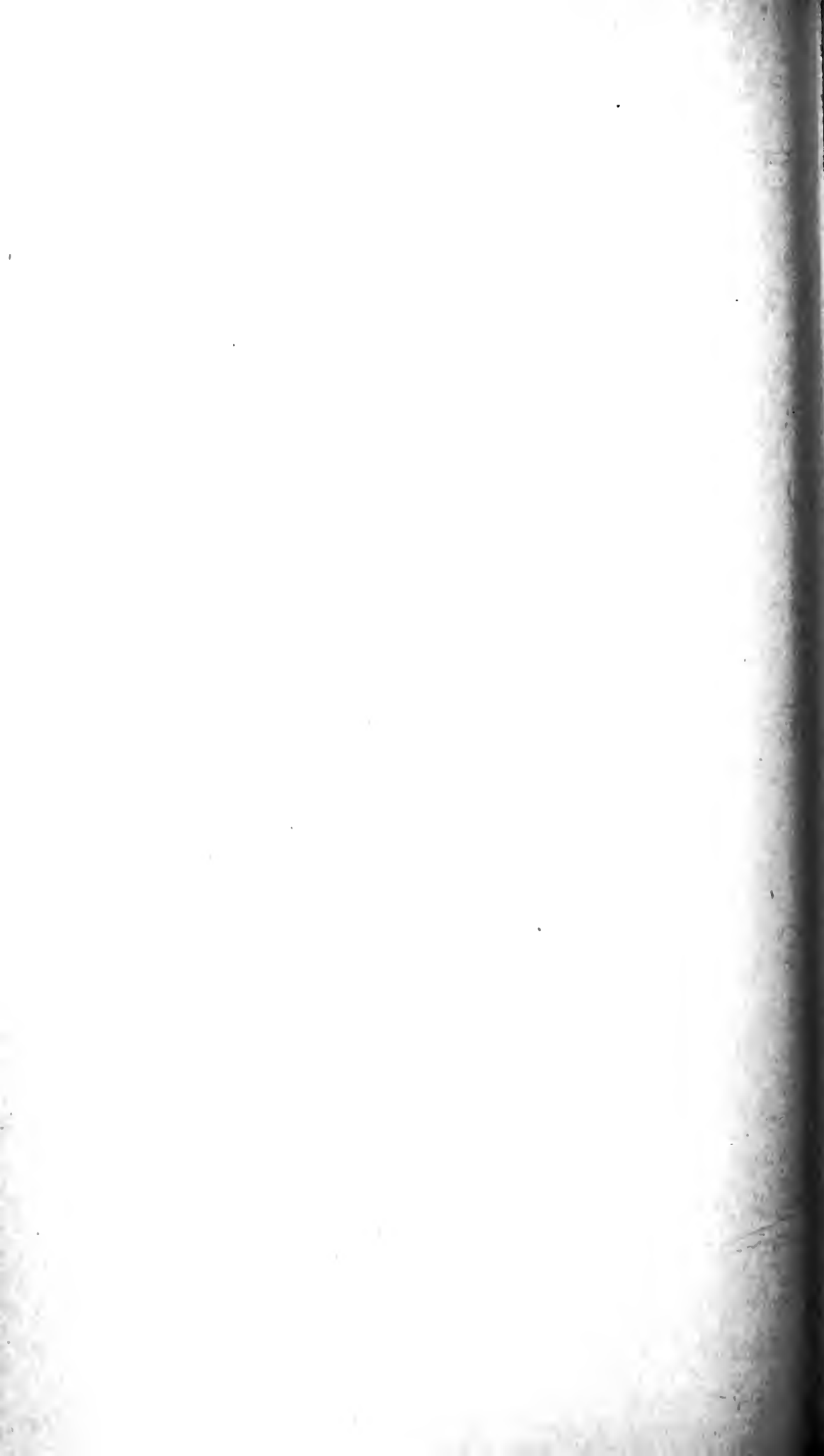
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IN THE
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JOSEPH M. BRULE,

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from an order of the District Court denying appellant's motion to vacate and set aside an alleged illegal sentence. The motion was made pursuant to Section 2255, Title 28, U.S.C.

A brief outline of the history of this action as taken from the District Court's record is of assistance

in determining the appellant's position before this Honorable Court.

Appellant and one James Ward were jointly charged in Counts I and III of a three count Indictment returned on March 23, 1955, with having violated Section 2554(a) of Title 26, U.S.C., now Section 4705(a) of Title 26, U.S.C., and Section 2(a) of Title 18, U.S.C. James Ward was charged alone in Count II. The government later dismissed Count III as to defendant Ward after that defendant entered a guilty plea to Counts I and II. Thereafter, a trial was had and a jury returned a verdict of guilty as to Joseph M. Brule on Counts I and III of the Indictment on May 25, 1955. On June 13, 1955, the government filed an Information against Joseph M. Brule charging that as a result of the conviction in the instant case he was a second offender of the Harrison Narcotic Act, having previously been convicted of a similar offense on May 12, 1952.

Thereafter, on the 14th day of June, 1955, Joseph M. Brule, appellant herein, admitted that he was identical with the person previously convicted. The court thereupon sentenced the appellant on Count I of the Indictment in the instant cause to be committed to the custody of the Attorney General of the United States for imprisonment in such institution as

the Attorney General of the United States or his authorized representative may by law designate for the period of seven years and to pay a fine of one dollar, and suspended the imposition of sentence on Count III, placing the appellant on probation for a period of five years commencing on the first day following his release from service of the sentence on Count I, all as set forth in the Judgment, Sentence, Commitment and Order of Probation dated June 14, 1955.

Thereafter, the record discloses that on September 6, 1955, the Court entered an order denying a letter application of the appellant for reduction of his sentence. The record then discloses that the appellant on March 26, 1956, filed in the District Court his "Motion to Vacate and Set Aside the Illegal Sentence on Count One of the Indictment", praying relief under Section 2255, Title 28, U.S.C. It is from the order of the District Court denying the relief prayed for in said motion, entered May 15, 1956, that Joseph M. Brule filed Notice of Appeal to this Honorable Court on June 6, 1956.

SUMMARY OF ARGUMENT

Although the appellant's Points on Appeal will be examined separately hereinafter, a review of the rec-

ord herein makes it immediately apparent that Joseph M. Brule is attempting by this proceeding to contest the sufficiency of the evidence to sustain the verdict of the jury and the sentence imposed in the District Court. It is respectfully submitted that the question of the sufficiency of the evidence to sustain a conviction and sentence thereupon may not be raised by motion under Section 2255 of Title 28, U.S.C. The appropriate remedy available to the appellant in this regard was by direct appeal from the Judgment and Sentence. No such appeal was taken herein. *Hanley v. United States* (D.C. 222) F.2d 566; *United States v. Segelman* (C.A. 3) 212 F. 2d 88; *Crawford v. United States* (C.A. 6) 219 F. 2d 478.

ARGUMENT

1. Appellant's first point is that there was no probable cause for the arrest, detention and conviction on Count I of the Indictment. It is first noted that the prosecution herein was by way of Grand Jury indictment. It further appears from the Commissioner's Transcript on file herein, that promptly after his arrest the appellant was brought before that magistrate, advised of the nature of the charge pending against him, of his right to counsel, and of his right to post bond. Appellant's argument in this area, there-

fore, is without merit. Secondly, the record demonstrates that appellant's arraignment on the Indictment was twice continued to allow him the opportunity of arranging for his own counsel. This he did and the appellant thereafter proceeded to a jury trial with the aid and assistance of counsel of his own choosing. Thereafter, the jury returned a verdict of guilty as to the count in the Indictment of which he complains and subsequently the District Court entered the Judgment and Sentence hereinabove referred to. In short, Joseph M. Brule had his day in court and any complaint he may have had concerning the sufficiency of the evidence could only have been heard in this Court through a direct appeal. He failed to avail himself of this remedy. (Note cases cited in Summary of Argument)

2. The appellant next contends that he was denied equal protection of the law. In support of this proposition, appellant has cited the Fourteenth Amendment to the Constitution of the United States. It is respectfully noted that the appellant's contentions here are basically identical with those set forth in his first point raised on appeal which, together with appellee's argument against the same, are set forth in the next preceding section of this brief.

Appellant cites in his brief a portion of the reporter's transcript of the testimony of James Ward,

his co-defendant and *a defense witness*, and relies on this testimony in support of the proposition that there was no evidence upon which the jury could convict him on Count I of the Indictment. The appellant overlooks or chooses to ignore the fact that this, together with all other evidence of the case, was presented to the jury for its consideration in arriving at its verdict. We specifically note here and invite the Court's attention to the testimony of Federal Narcotic Agent Charles S. Montgomery which is in direct conflict with the cited portion of Witness Ward's testimony. We presume that the jury returned its verdict after evaluating *all* of the evidence in the case.

In any event, the appellant's remedy for relief under this contention was by an appropriate and timely appeal from the Judgment and Sentence of the District Court.

3. The appellant last urges that undenied contentions must be admitted as true. The appellant here alludes to the fact that in the order of May 15, 1956, from which this appeal is taken, the learned trial judge did not attempt to refute all of the allegations in support of the appellant's motion. From what has been said hereinabove and as is demonstrated by the record of this cause, it is apparent, as it was to the District

Court, that, on its face, the motion sought relief that the moving party was not entitled to. Accordingly, the Court did not make findings of fact or conclusions of law as none were required. *Crawford v. United States* (C.A. 6) 219 F. 2d 478.

CONCLUSION

The appellant, Joseph M. Brule, was tried and convicted by a jury of his peers. He was represented during the trial and the subsequent sentencing of the Court by counsel of his own choosing. Long after the time for appeal had run, he attempted to attack the adequacy of the proceedings and the sufficiency of the evidence against him by way of a motion made pursuant to Section 2255, Title 28, U.S.C. It is respectfully submitted that the provisions of that section have no application to the factual situation in this case. Hence, the appellant is not entitled to the relief he prays. The Order of the District Court entered May 15, 1956, should therefore be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY

United States Attorney

JOHN A. ROBERTS, JR.

Assistant United States Attorney



No. 15,197

IN THE

United States Court of Appeals
For the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General
of the United States, as Successor to the
Alien Property Custodian,

Appellant,

VS.

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Appellee.

Upon Appeal from the United States District Court
for the Southern District of California,
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**OPENING BRIEF OF HERBERT BROWNELL, JR.,
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No. 15,197

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HERBERT BROWNELL, JR., Attorney General
of the United States, as Successor to the
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Appellee.

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for the Southern District of California,
Northern Division.

**OPENING BRIEF OF HERBERT BROWNELL, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT.**

JURISDICTION.

The plaintiff-appellee sued the Attorney General, defendant-appellant, to recover property vested under the Trading with the Enemy Act (R. 6-7). A motion by the appellant to dismiss on the ground that, according to Section 33 of the Act, the action was brought too late was overruled on July 1, 1952 (R. 8-9). After trial the District Court entered judg-

ment for the appellee on April 20, 1956 (R. 35). The appellant filed a notice of appeal on June 11, 1956 (R. 36). The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1291.

The "Memorandum and Order" of the District Court is not reported but is printed at pages 13-27 of the Transcript of Record. The Findings of Fact and Conclusions of Law are likewise not reported. They are to be found at pages 28-34 of the Transcript of Record.

STATEMENT OF FACTS.

The Attorney General vested the property in question under the Trading with the Enemy Act by Vesting Order No. 10267, dated December 9, 1947, and filed with the Division of the Federal Register on December 17, 1947 (12 F.R. 8452).¹ On or about October 17, 1950, the appellee's brother and agent filed with the Office of Alien Property, Department of Justice, a notice of claim for the property (R. 5), and in September, 1951, appellee himself filed a notice of claim (R. 6). The original complaint in this action was filed October 23, 1950 (R. 13), and the amended complaint September 28, 1951 (R. 7).

Akira Morimoto, the plaintiff-appellee, was born in Fresno, California, on April 18, 1912 (R. 42). His

¹By Executive Order No. 9788 (October 15, 1946, 11 F.R. 11981) the Attorney General succeeded to the functions and authority, including the authority to vest property, of the Alien Property Custodian.

parents were living in California at that time but were always nationals of Japan (R. 85).

The appellee lived in Fresno until 1924, with the exception of a period in 1917-1919 when he accompanied his parents on a trip to Japan (R. 43, 88), and went to school in Fresno (R. 31). His father owned the real estate in Fresno which is the subject of this suit, and a ranch, and had considerable sums of money due him (R. 86-87).

In 1924 appellee's father, who was in ill health, sold his business in Fresno and he and his wife returned to Japan, taking the appellee with them (R. 86, 88). The parents never came back to the United States (R. 86). Two older brothers of the appellee remained in the United States, one being a partner in the firm which took over the father's business (R. 42, 86).

After their return to Japan the family settled in Hiroshima, where the father purchased a home (R. 53-55, 117). The appellee attended grammar school and high school in Hiroshima, being graduated from the latter in 1930 (R. 31). He remained at home for two years more, preparing to enter medical school (R. 55-56).

In 1932 when the appellee reached twenty years of age he became subject to compulsory military service under the Japanese law (R. 68, 75). He was a dual national, having United States citizenship by birth and being also a citizen of Japan under the law

of that country (R. 31).² In 1932, however, he was deferred from military service in order that he might complete his medical education (R. 68). In that year his father took out a passport for a business trip to the United States, but died before embarking (R. 87).³

From 1932 until 1938 appellee attended the Nippon Medical College in Tokyo, and he was graduated in March, 1938 (R. 136). While in school he boarded in Tokyo (R. 56-57), but returned to his home in Hiroshima for vacations (R. 58). He took his physical examination for the army in May, 1938, and passed it (R. 63), but he did not enter the service until October, 1938 (R. 65-66, 159). In the meantime he served as an interne at the Red Cross hospital in Tokyo (R. 66, 98-99).

Under Japanese law appellee had a choice: he could be drafted as a private or he could elect to apply for a commission as a medical officer, for what he could expect to be a shorter term of service (R. 75-76, 134). He also had a choice between entering the service in the Spring or Fall of 1938, and chose the latter (R. 62, 75-76).

At no time during this period did the appellee assert his American citizenship. He did not report to the consulate or register there as a citizen, and

²His father had reported his birth to the Consul General of Japan as April 27, 1912, and it was entered in the family census record in Japan on June 7 of that year (R. 109). Apparently he never has had his name removed from that record.

³Thereupon appellee accepted the succession as head of the family (R. 108).

he did not offer his American citizenship as a reason for being excused from military service (R. 90, 160-161). As far as the record shows, the first time he claimed American citizenship was in 1949.

On the stand appellee explained his actions in 1938 by saying:

. . . after I finished my education and I have to go to army that was the promise for my education, because if I object getting into the army, well, I couldn't have education either, so I have to omit—to get into army, but in that circumstances if I go to army two years and after that I will be free and I can be able to go any place. [R. 161]⁴

The appellee entered the Japanese Army on October 10, 1938, as a Medical Officers Candidate. On December 15 of that year he was commissioned as a First Lieutenant in the Medical Corps (R. 125). His army service was in Manchuria, with the First Imperial Guards (R. 44-45, 67-68). On entering the service he swore allegiance to the Emperor (R. 89, 145-146). He was transferred to the reserves on December 15, 1940, and recalled to duty, continuing to serve in Manchuria (R. 125). On March 10, 1942, he was promoted to the rank of Captain (R. 125). His service continued until August 18, 1945, when he was captured by the Russians, who took him to

⁴In a written statement he said, "I . . . thought that it would be more to my advantage utilize my capabilities and serve as a medical officer if I must serve in the Army either way, and so I volunteered in response to the Army's call for short-term medical officers in autumn" (R. 76).

Siberia as a prisoner of war September 9, 1945 (R. 45). He was repatriated to Japan on December 4, 1948 (R. 125).

The appellee was married in 1943, while in the army, and has two children, born in 1944 and 1946 (R. 47, 112). His wife lived with him for a while in Manchuria, and then returned to live with her parents in Tokyo (R. 47-48). The appellee did not register his children with an American consulate (R. 157-158).

During his army service in Manchuria and his imprisonment in Siberia the appellee continued to regard his family's place in Hiroshima as "home" (R. 73). On the Japanese official records Hiroshima was carried as his "permanent domicile" (R. 102-103).

As previously stated, appellee's father died in 1932. Appellee testified that his mother was killed in the Hiroshima explosion (R. 48). According to a paragraph in Exhibit C-1, which was omitted in printing (see R. 111), his mother died on November 15, 1945.

In regard to returning to the United States, the appellee testified that in 1924 when he went to Japan as a boy of twelve he had no particular intention, but that after he attended the medical school he gradually built up an intention to return to the United States (R. 51). Immediately thereafter he testified that the date of starting to form that intention was 1932, when he became twenty years old (R. 52).

When the appellee returned to Japan in 1948 he was in bad physical condition and was suffering from the results of malnutrition while a prisoner of war (R. 46). He registered in April, 1949, as a citizen with the American consulate in Yokohama (R. 46-47) and received an American passport in October, 1950 (R. 32), and he returned to the United States in December, 1950.

The real estate in question was inherited by the appellee in 1932 under the will of his father (R. 86-87, 92).⁵ The Attorney General vested it in December, 1947.

The District Court on July 1, 1952, overruled appellant's motion to dismiss on the ground that the action was not timely under Section 33 of the Act (R. 8). After trial, that Court found that the appellee served in the Japanese Army in obedience to Japanese law; that his service after December 8, 1941, was involuntary; and that after that date appellee was not an "officer, official or agent of Japan within the Trading with the Enemy Act" (R. 32). It also found that appellee was not physically present in Japan from September 9, 1945 to December 4, 1948, and was not "resident within" Japan within the Act on the date of the Vesting Order, December 9, 1947 (R. 32). It found and concluded that the appellee was not an "enemy" as defined in the

⁵By stipulation of the parties the real estate was sold by the Attorney General subsequent to the commencement of this action, and the proceeds are held to abide the result, as well as certain accruals (R. 30).

Trading with the Enemy Act (R. 33, 34), and that the action had not been commenced after the time limited by Section 33 (R. 33). Judgment for the plaintiff was entered April 20, 1956 (R. 35). Notice of appeal was filed June 11, 1956 (R. 36).

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Court erred in overruling the defendant's motion to dismiss the complaint on the ground that the action was not instituted within the limitations of time prescribed by Section 33 of the Trading with the Enemy Act, and in holding that it had jurisdiction of this action.

2. That the District Court's Finding of Fact X that, "It is not true that this action was commenced after the time limited therefor by the provisions of Section 33 of the Trading with the Enemy Act, as amended" (R. 33), was clearly erroneous as a matter of fact and of law, in that on the admitted and pleaded facts the property in suit "vested" in the Attorney General on December 17, 1947, no notice of claim was filed on behalf of the plaintiff-appellee before October 17, 1950, and this action was not instituted until October 23, 1950, while, under said Section 33, the last date by which an action could be filed was December 17, 1949.

3. That the District Court's Finding of Fact VII (R. 32) that the service of the plaintiff-appellee in the Japanese army after December 8, 1941, was in-

voluntary and that he was not on account of such service or otherwise an officer, official, or agent of Japan within the Act was clearly erroneous in that the uncontradicted evidence was that the plaintiff-appellee chose to become a commissioned officer and in that there was no evidence that he was coerced to military service.

4. That the District Court erred in holding that the plaintiff-appellee was not an "enemy" within the Act as an officer of the Japanese Government.

5. That the District Court's Finding of Fact VIII (R. 32) that the plaintiff-appellee was not resident within Japan from September 9, 1945 to December 4, 1948, or on December 4, 1947, was clearly erroneous in that the uncontradicted evidence was that from 1924 up to December, 1950, his home or domicile was in Japan.

6. That the District Court erred in holding that the plaintiff-appellee was not an "enemy" within the Act as an individual "resident within" Japan during the war.

7. That the District Court erred in entering judgment in favor of the plaintiff-appellee.

SUMMARY OF ARGUMENT.

Section 33 of the Trading with the Enemy Act prescribes the conditions of time imposed by Congress on the consent of the United States to be sued for the recovery of vested property and limits the

jurisdiction of the courts over such suits. As amended in 1948, Section 33 provided that suits for the recovery of vested property had to be brought by April 30, 1949, or within two years from the date of the vesting of the property, "whichever is later". The property claimed by the appellee vested in the Attorney General on December 17, 1947, so the two-year period expired December 17, 1949, which was the "later" date. The suit was not brought until October 23, 1950, so the Court did not have jurisdiction.

As part of a war statute, Section 33 was intended by Congress to apply during the war and to apply to all suits and claims; its application, unlike that of the ordinary statute of limitations, was not to be suspended or tolled during the war. The provisions of Section 33 afforded a reasonable opportunity to sue and were within the constitutional authority of Congress.

The Court also lacked jurisdiction because suits under Section 9(a) of the Act may be brought only by a person who is not an "enemy" within the Act, and plaintiff was an enemy as being "resident within" enemy territory during the war and as an "officer" of the enemy government.

Although appellee was physically absent from Japan from 1938 until 1948, on military service in the Japanese army, he remained domiciled in Japan, where his home was. Individuals "resident within" enemy territory are included in the Act's definition of "enemy" because their property is subject to the power of the enemy government as their persons are.

The appellee, domiciled in Japan and subject to its power, was "resident within" that country for purposes of the Act. So to hold is consistent with *Guessefeldt v. McGrath*, 342 U.S. 308, which dealt only with the question when individuals physically present in enemy territory are "resident".

Appellee was an "enemy" as a "resident" even though he was a citizen of the United States as well as of Japan because the Act's definition of "enemy" comprehends individuals "of any nationality". And, since he was "resident within" from December 8, 1941 until September, 1945, he continued to be an "enemy" even while he was a prisoner of war, because the plan of the Act is to treat as enemy-owned property throughout the war property which was so owned at any time during the war.

Appellee was also an "enemy" because as a commissioned officer in the Japanese army he came within the language of Section 2(b), which defines "any officer" of an enemy government as an enemy. On the evidence he entered the army pursuant to Japanese law requiring military service, but he was not subjected to actual coercion and made no effort to escape service, so his service in the army was "voluntary", after December 8, 1941, as before. Moreover, he was not compelled to become an officer, but chose to do so.

Vowinckel v. First Federal Trust Co., 10 F. 2d 19 (C.A. 9), is distinguishable, since Vowinckel appears to have been an officer of the German Red Cross and not of the German Government.

ARGUMENT.

1. **THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE ACTION BECAUSE IT WAS BROUGHT AFTER THE TIME LIMITED BY SECTION 33.**

As the Trading with the Enemy Act stood on the entry of the United States into World War II, it contained no statute of limitations on the time when suits for recovery of vested property might be brought. In 1946 Congress remedied this omission by adding Section 33, and in 1948 it amended that Section. As amended, the part of Section 33 which is immediately relevant here provides:

No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian,⁶ as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.⁷

This sets up two periods of limitation, after April 30, 1949, or “after the expiration of two years from the date of the . . . vesting in the Alien Property Custodian, . . . whichever is later”.

The Vesting Order in this case was dated December 9, 1947, and was filed with the Federal Register

⁶See footnote 1, *supra*.

⁷Section 33 was also amended in 1954 (68 Stat. 7 and 68 Stat. 767), but those amendments affect the filing of *claims*, not suits. We have reprinted the complete text of Section 33 as it stands now in the Appendix to this brief, *infra*, p. viii.

on December 17, 1947 (12 F.R. 8452). That was the date when it was effective and when the property “vested” in the Attorney General (Regulations of the Office of Alien Property, §504.1 (8 C.F.R., 1952 Revision; 17 F.R. 1082)). Two years from that date, or December 17, 1949, was the “later” date for purposes of Section 33. Appellee’s claim was not filed with the Office of Alien Property until October 17, 1950 (R. 5), or after the expiration of the two years,⁸ and the original complaint in this action was not filed until October 23, 1950 (R. 13), also after the two years. The “later” date being December 17, 1949, appellee’s suit was nearly a year late and was barred by Section 33; “No suit pursuant to section 9 may be instituted . . .”.

The amended complaint (R. 3-7) did not mention Section 9, but if this action is to be maintained at all, it must be under that Section, which provides the “sole relief and remedy” for claimants who would sue to recover vested property. Trading with the Enemy Act, Section 7(c) (*infra*, pp. ii-iii); *Becker Co. v. Cummings*, 296 U.S. 74, 79; *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 487; *Koehler v. Clark*,

⁸It is assumed in appellee’s favor that he may take advantage of the notice of claim filed by his brother and agent on October 17, 1950. Appellee himself filed a notice of claim September, 1951 (R. 6). The filing of a notice of claim is a condition precedent to a suit under Section 9(a) (*LaDue & Co. v. Brownell*, 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823), but a Section 9(a) suit is not a review of an administrative proceeding on the claim and need not await decision of the claim. *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S.D.N.Y.); *Duisberg v. Crowley*, 54 F. Supp. 365 (N.J.). And see, *Stoeck v. Wallace*, 255 U.S. 239, 246.

170 F. 2d 779, 780 (C.A. 9).⁹ And this limitation of remedy to a suit under Section 9 is constitutional. *Tiedemann v. Brownell*, 222 F. 2d 802 (C.A.D.C.).¹⁰

The provisions of Section 33 are a condition of the consent of the United States to be sued and must be strictly complied with. See, *Banco Mexicano v. Deutsche Bank*, 263 U.S. 591, 602-603; and cf. *Edwards v. United States*, 163 F. 2d 268 (C.A. 9); *Anderegg v. United States*, 171 F. 2d 127 (C.A. 4), certiorari denied, 336 U.S. 967; *LaDue & Co. v. Brownell*, 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823. Being a condition to the consent of the United States to be sued, the requirement imposed by Section 33 goes to the jurisdiction of the court (*Cisatlantic Corporation v. Brownell*, 131 F. Supp. 406 (S.D.N.Y.), affirmed, 222 F. 2d 957 (C.A. 2); *Kroll v. McGrath*, 91 F. Supp. 173 (D.C.D.C.); *Pedersen v. Brownell*, 129 F. Supp. 952, 953 (Ore.)), and it may not be waived. *Cisatlantic Corporation v. Brownell*, *supra*. And see, *Wallace v. United States*,

⁹Section 33 as amended in 1948 says "section 9", which means, in practice, Section 9(a), for Section 9(b) has been held inapplicable to World War II vestings. *Feyerabend v. McGrath*, 189 F. 2d 694 (C.A.D.C.). Section 9(b) was part of the World War I provisions for the return of enemy property. See, *Markham v. Cabell*, 326 U.S. 404, 418.

¹⁰Claims for the return of property may also be filed under Section 32 of the Act, but those proceedings are a matter of administrative discretion and are not subject to judicial review. *Tiedemann v. Brownell*, *supra*; *Hawley v. Brownell*, 215 F. 2d 36 (C.A.D.C.); *McGrath v. Zander*, 177 F. 2d 649 (C.A.D.C.). The same situation obtained during the World War I period with respect to action under Section 23 of the Act. *Kutthroff v. Sutherland*, 66 F. 2d 500 (C.A. 2); *Becker Steel Co. of America v. Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604.

142 F. 2d 240 (C.A. 2), certiorari denied, 323 U.S. 712; *Anderegg v. United States*, *supra*. Cf. *Albert v. Brownell*, 219 F. 2d 602 (C.A. 9).

The language of Section 33, "No suit pursuant to Section 9 may be instituted . . ." is all-inclusive and must be taken to mean what it says, and the courts have construed and applied it at face value. In *Pass v. McGrath*, 192 F. 2d 415 (C.A.D.C.), certiorari denied, 342 U.S. 910, the property was vested in 1943, so the two years after vesting expired in 1945, and April 30, 1949, was the "later" date. Pass filed his claim in September, 1946, after the expiration of the two years, though before April 30, 1949, but he did not bring suit until October of 1949. The Court held that his suit was barred, saying:

Since no suit and no claim was pending within two years after the property vested in the Custodian, the "later" date and the last on which suit could be brought was April 30, 1949. The claim filed with the Custodian in September, 1946, could not toll the two-year period that had expired in 1945.

To the same effect, see *Kroch v. McGrath*, 192 F. 2d 416 (C.A.D.C.), certiorari denied, 342 U.S. 927; *Hawley v. Brownell*, 215 F. 2d 36 (C.A.D.C.); *Cisatlantic Corporation v. Brownell*, *supra*.

So, in the present case the two-year period from vesting expired December 17, 1949; it was not reopened or tolled by the filing of a claim nearly a year later.

By a 1954 amendment (68 Stat. 7) Congress extended the time for filing *claims* to February 9, 1955, but significantly it did not change the limitation of time for suits. That amendment of one part of Section 33 retroactively authorized the filing of notices of claim in 1950 and 1951,¹¹ but it did not extend the time for filing suits. *Pedersen v. Brownell*, 129 F. Supp. 952 (Ore.); *Grabbe v. Brownell*, 140 F. Supp. 4, 6 (E.D.N.Y.). That is, the Congress made appellee eligible for a discretionary administrative return under Section 32(a)(2)(D) (*infra*, pp. v-vii), dealing with dual nationals, but did not restore the right to sue which he had lost by lapse of time.

Unlike the ordinary statute of limitations, which is not framed in contemplation of war (*Salvoni v. Pilsen*, 181 F. 2d 615 (C.A.D.C.), certiorari denied, 339 U.S. 981), Section 33 is part of a statute addressed to the specific problems created by war. When it was first enacted in 1946 the United States was still at war with Germany and with Japan,¹² and when Congress amended Section 33 in 1948 to set April 30, 1949, as one of the alternative periods of limitation, we were still at war with those countries. The application of the ordinary peacetime statute of limitations

¹¹Under Section 33 as amended in 1948 the time for filing claims was also April 30, 1949, or two years from vesting (62 Stat. 1218).

¹²The state of war with Germany terminated with the Joint Resolution of October 19, 1951 (65 Stat. 45); the state of war with Japan with the 1951 Treaty of Peace, which was ratified March 20, 1952 (*U.S. Code Congressional & Administrative Service*, 1951, Vol. 2, pp. 2730-2742; *id.*, 1952, Vol. I, p. LXV). And see, *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57; *National Savings & Trust Co. v. Brownell*, 222 F. 2d 395 (C.A.D.C.), certiorari denied, 349 U.S. 955.

is suspended during war because war denies enemies access to the courts. *Hanger v. Abbott*, 6 Wall. 532, 536, 538-539; *Brown v. Hiatts*, 15 Wall. 177, 184; *Osbourne v. United States*, 164 F. 2d 767, 768-769 (C.A. 2).¹³ To apply that rule to Section 33 would be to say that in 1946 Congress enacted a statute of limitations which would come into effect it knew not when, and that, when in 1948 it put the date of April 30, 1949, in Section 33, it did not expect that date to have any effect.

The legislative history of Section 33 discloses that Congress enacted that Section with war conditions in mind and knew what it was doing. As originally approved on August 8, 1946, the Section provided that suits must be brought by two years after vesting or by August 8, 1948, whichever was later (60 Stat. 925). That provision Congress regarded as allowing a reasonable time within which litigation with respect to alien property matters should be brought to a close. Senate Report No. 1839, 79th Cong., 2d Sess., p. 3; House Report No. 2398, 79th Cong., 2d Sess., p. 9.

That Congress had in mind the conditions created by the war and resulting from it appears even more clearly from the history of the 1948 amendment. On March 25, 1948, Peyton Ford, The Assistant to the Attorney General, addressed a letter to the Speaker of the House of Representatives.¹⁴ Mr. Ford pointed

¹³The *Osbourne* case did not purport to approve any special period of suspension for prisoners of war; it applied to statutes dealing with the ordinary peacetime activities of the Government the rule of *Hanger v. Abbott*, *supra*, that such statutes of limitations are suspended during war.

out that many possible claimants had not been able to file claims in the time since August 8, 1946, and might not be able to file by August 8, 1948, because they were "displaced persons" or because the disorganization resulting from the war had prevented them from learning of or asserting their privileges under the Act. He proposed that the final date for filing claims be extended to July 31, 1949, and that, where the August, 1948, limiting date on claims and suits was retained, it should be changed to August 9, because the 8th was a Sunday. A bill embodying these suggestions was introduced. H. R. 6116, 94 Cong. Rec. 5994.

In response to this suggestion Congress amended Section 33, but the changes it made in the bill as originally introduced are significant as evidence of its intention to limit to a reasonable and fair extent all claims and suits. For both claims and suits the date of April 30, 1949, was substituted in place of July 31, 1949 and August 9, 1949 (the dates Mr. Ford had suggested), respectively. For each the alternative period of two years after vesting was retained. There is no explanation in the legislative history of the reasons for these changes (see 94 Cong. Rec. 8718), but the detailed and careful modifications and the departures from the form of the bill as introduced show that Congress had a definite intention and that that intention was to enact periods of limitations that

¹⁴The letter is set out in Senate Report No. 1532 (80th Cong., 2d Sess.), pp. 1-2, and House Report No. 1843 (80th Cong., 2d Sess.), pp. 1-2.

would apply to all claims and suits under the Act, while making reasonable allowance for the dislocations and disabilities produced by the war. The 1948 amendment (62 Stat. 1218) was approved July 1, 1948, so the April 30, 1949, date gave all claimants at least a full ten-month period in which to sue. The retention of the alternative period of two years after vesting gave other claimants, like the appellee, more than ten months. On the facts of this case it gave the appellee until December 17, 1949. And the language, "No suit pursuant to section 9 may be instituted after . . ." shows that Congress intended to rule out all exceptions for which it did not specifically provide in the 1948 amendment.

For purposes of this branch of our argument we assume *arguendo* that the appellee is not an "enemy" within the Act and that he is within the protection of the Fifth Amendment. His former ownership of the vested property is conceded, but no matter how justifiable his claim, it could be cut off by a statute of limitations. *Kavanagh v. Noble*, 332 U.S. 535, 539. The power of Congress to impose a statute of limitations on suits against the United States is not open to question. *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533-535; *Finn v. United States*, 123 U.S. 227, 231-232; *United States v. John K. & Catherine S. Mullen Benev. Corp.*, 63 F. 2d 48, 56 (C.A. 9), affirmed on another ground, 290 U.S. 89. The power of Congress to limit the time for suits against the United States is extremely broad. *Maricopa County v. Valley Bank*, 318 U.S. 357, 362. And a statute of limi-

tations that allows a reasonable time for commencing suit is not constitutionally objectionable. *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 562. See also, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304; *McCloskey & Co. v. Eckart*, 164 F. 2d 257, 260 (C.A. 5). When the Congress has plainly indicated its intention, as in Section 33, that intention must be given effect.¹⁵

2. ON THE FACTS APPELLEE IS AN "ENEMY" WITHIN THE ACT AND MAY NOT MAINTAIN AN ACTION UNDER SECTION 9(a).

In addition to the conditions imposed by Congress in Section 33 on the time for suits to recover vested property, it has imposed a personal qualification for plaintiffs. By the language of Section 9(a) a plaintiff under that Section must not be an "enemy", and a plaintiff must bring himself within this "negative characterization" in order to give the court jurisdiction. *Albert v. Brownell*, 219 F. 2d 602 (C.A. 9); *Garvin v. Kogler*, 272 Fed. 442, 444 (C.A. 3). In a Section 9(a) suit the burden of proof is on the plain-

¹⁵Two minor issues may be briefly noted. The "finding" of the District Court (R. 33, and see R. 30) that the action had not been commenced after the time limited by Section 33 was contrary to the facts of record and those pleaded in the amended complaint (R. 5, 6) and was clearly erroneous.

In the District Court, the appellee relied upon Section 8 of the Trading with the Enemy Act (*infra*, p. iii) as affecting the application of the period of limitations. Section 8 was part of the original Act of 1917 and cannot be read as affecting Section 33, as passed in 1946 and 1948. Also, its subject matter is not suits against the United States, but contracts containing promises to pay, evidenced by commercial paper drawn against or secured by funds or property situated in enemy territory.

tiff. *Von Zedtwitz v. Sutherland*, 26 F. 2d 525, 526 (C.A.D.C.); *Beck v. Clark*, 88 F. Supp. 565, 568 (Conn.), affirmed, 182 F. 2d 315 (C.A. 2).

“Enemy” is defined in Section 2(a) (*infra*, p. i) of the Act as: A person “of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war”; and 2(b) an “officer, official, agent” of a government of a nation with which the United States is at war. On the evidence appellee came within both of these parts of the definition. The District Court, however, held that he came within neither.

A. Appellee was an “enemy” as an individual “resident within” Japan during the war.

The District Court based its holding that appellee was not an enemy in part on a finding that he was not physically present in Japan from September 9, 1945 to December 4, 1948, and that he was not “resident within” Japan during that period or on the date of the Vesting Order, December 9, 1947 (R. 32). Except for that the Court made no finding as to residence, although it did find that the appellee lived in Japan from 1924 until his entry into the army in 1938 (R. 31).

A finding of fact is “clearly erroneous” if it is contrary to the uncontradicted and credible evidence (*Grace Bros. v. Commissioner of Internal Revenue*, 173 F. 2d 170, 174 (C.A. 9)), and a finding is not binding under Rule 52(a) (Federal Rules of Civil Procedure) if it is based upon or induced by an erroneous theory

of the applicable law. *United States v. Griffith*, 334 U.S. 100, 109; *Anderson v. Federal Cartridge Corporation*, 156 F. 2d 681, 684 (C.A. 8). In the present case appellee's own uncontradicted testimony was that his home—that is, his domicile—was in Japan. The District Court erred in disregarding that evidence; and in determining whether he was “resident within” Japan it applied an erroneous theory as to the meaning of “resident” and as to when he had to be “resident”.

In *Guessefeldt v. McGrath*, 342 U.S. 308, the Court said that “resident within”, as used in the Act, implies “something more than mere physical presence and something less than domicile”, and that it does not include prisoners of war, expeditionary forces and “sojourners” (pp. 311-312). In *Guessefeldt*, however, the Court was only concerned with the question of when a person physically present in enemy territory is and is not “resident”. On the allegations of his complaint Guessefeldt was physically present in Germany, but he claimed that he was not “resident” because he would not have remained there if he had not been constrained. On the facts of that case the Court had no occasion to consider whether a person could be “resident within” enemy territory at a time when he was not physically present or was temporarily absent therefrom.

There is authority under the Act for the view that a citizen of the United States domiciled in enemy territory is “resident within” and an “enemy”. In *re Territo*, 156 F. 2d 142, 145 (C.A. 9); *Kahn v. Garvan*,

263 Fed. 909, 915 (S.D.N.Y.). Nothing in the language of the Supreme Court in *Guessefeldt* seems to impair the authority of those statements. Domicile generally means "home". Beale, *The Conflict of Laws* (1935), Vol. I, p. 109, quoted in *Ecker v. Atlantic Refining Company*, 222 F. 2d 618, 621 (C.A. 4), certiorari denied, 350 U.S. 847. On the record appellee's home, even when he was a prisoner in Siberia, was in Japan (R. 43, 53, 57-58, 69-70, 73). One reason for the Section 2 definition of a "resident" as an enemy is that when a person is living in enemy territory he is subject to the enemy's power, and so is his property, and because of that fact it is made subject to seizure. *Kahn v. Garvan*, 263 Fed. 909, 915 (S.D.N.Y.). Appellee was domiciled in Japan, and when physically absent from that country from 1938 to 1945 on military service in Manchuria, he was as much subject to the power of the Japanese Government as if he had remained at home, and to hold him "resident" is within the reason of the statute. A purpose of the Section 2 definition being to subject to seizure the property of persons who are within the enemy's power, that purpose is furthered by holding appellee, who was domiciled in Japan and subject to its authority even when in Manchuria, to be a "resident". That is the way in which "resident" in a statute should be construed. *McGrath v. Kristensen*, 340 U.S. 162, 175.¹⁶

¹⁶Section 2 is to be read, however, to except those transients and sojourners who are constrained to remain in enemy territory, as well as "prisoners of war, expeditionary forces". *Guessefeldt v. McGrath*, 342 U.S. 308, 311-312. The terms quoted obviously refer to Americans who become prisoners of the enemy and American expeditionary forces, and do not aid the appellee.

The effect of the District Court's holding, on the other hand, would be that no domiciled Japanese who was on foreign service after the United States entered the war would be an enemy. The Court cited *Public Adm'r of New York County v. Brownell*, 115 F. Supp. 139 (S.D.N.Y.), in which the court seems to have held, citing *Guessefeldt*, that a person who was at all relevant times present in enemy or enemy-occupied territory, and who was domiciled in an enemy-occupied country, may not have been "resident within" any of those places.¹⁷ But, as we have indicated, the Court in *Guessefeldt* did not have to consider the situation of a person who was domiciled in an enemy country but physically in a different but enemy-occupied country, and it does not follow from the fact that a person may be "resident" without being domiciled that a person domiciled is not "resident".¹⁸

Since the appellee's home, his domicile, was in Japan in December, 1947, when the property was vested, he was at that time "resident within" and an enemy. The District Court, however, seems to have

¹⁷The decision was a denial of a motion for summary judgment, which was not appealable.

¹⁸In the court below the appellee argued that in 1947, when the property was vested, it was not subject to the power of Japan. But it had been so subject up to the date of his capture in 1945, and the language of the Act does not make the application of the definition depend upon whether the property is actually subject to the enemy's power at the time. The suggestion in *Josephberg v. Markham*, 152 F. 2d 644, 648 (C.A. 2), that the court may examine the necessity for vesting has not been followed. The general rule is that the decision whether to vest is a matter of executive discretion. *Clark v. Allen*, 331 U.S. 503, 511; *Codray v. Brownell*, 207 F. 2d 610, 615 (C.A.D.C.), certiorari denied, 347 U.S. 903; *Orme v. Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335, 339, certiorari denied, *sub nom. von Hardenberg v. McGrath*, 343 U.S. 921.

been of the opinion that the appellee was not then an "enemy" because he was not at that date in Japan (R. 32). As we have already indicated, the Supreme Court's decision in *Guessefeldt* does not require that result, and there is nothing in Section 2 to require that a person be physically in enemy territory on the exact date of vesting. To make the correctness of a vesting and a party's capacity to sue depend upon a physical absence of perhaps one day would render the seizure of enemy property a matter of chance and caprice. The better rule seems to be that once enemy status has attached it is not thereafter lost by a change in the activities or the location of the individual.¹⁹ In *Swiss Nat. Ins. Co. v. Miller*, 289 Fed. 571 (C.A.D.C.), the Court said:

It would have been useless to seize enemy-owned property if the owner could recover it immediately by the simple expedient of changing his residence or his place of business. [p. 573]

The Supreme Court affirmed, saying that the term "enemy" as used in the Act "refers to the person who . . . fulfilled the definition of an enemy during the war". *Swiss Ins. Co. v. Miller*, 267 U.S. 42, 45.²⁰

¹⁹This is different from the rule of prize law, which does not deal with the seizure of property on land, but only of property engaged in unlawful trade, that is, belonging to or destined for a person actually in enemy territory. See, *The Sally*, 8 Cr. 382, 384; *The Rapid*, 8 Cr. 155, 162, 163.

²⁰And in *Behn, Meyer & Co. v. Miller*, 266 U.S. 451, 471, the Court said, "We think that subsection (a) of §9 gives now, as the same words gave from the first, the right of recovery to any person *never* 'an enemy or ally of enemy', within the statutory definitions" (Italics added).

More recently, in *Hansen v. Brownell*, 132 F. Supp. 47 (D.C.D.C.), the plaintiff lived in Germany from 1939 until 1948, when he left that country, and his property was not vested until 1951. The Court held that his removal from Germany did not change his enemy status, saying:

The fact that he subsequently left Germany and went to France does not help him. Actual hostilities had ceased, it is true, but the war had not officially, and he was still an enemy alien. [p. 48]

On appeal the Court of Appeals affirmed, without reference to the question of residence, on the ground the plaintiff's status as enemy because he had acted as an enemy "agent" continued throughout the war, although the activities which made him an agent ceased in 1945. *Hansen v. Brownell*, 234 F. 2d 60 (C.A.D.C.).

The Court of Appeals in *Hansen* cited *Sarthou v. Clark*, 78 F. Supp. 139 (S.D. Cal.), in which the plaintiff's decedent, von Neindorff, acted as a German spy in 1942. His property, however, was not vested until 1943 and 1944, when he was no longer a spy; nevertheless, the Court held that von Neindorff having been an "enemy" in 1942, his executor could not recover.²¹

²¹In *Sarthou* the Court stated the question for decision thus: "Was Paul von Neindorff an officer, official or agent of the Government of Germany at any time between December 11, 1941, the date of the Axis declaration of war against the United States, and November 15, 1944, the date of the death of Paul von Neindorff?" (p. 142).

In *Sarthou* the Court also passed on the question of "resident within" saying that, "It is a habitation having domiciliary properties" (p. 142). In that respect the *Sarthou* opinion does not appear necessarily to have been overruled by *Guessefeldt v. McGrath*, 342 U.S. 308, for the reasons we have indicated.

The Court of Appeals in *Hansen* suggested as a reason for the persistence of enemy status that a purpose of the Act was to “reach assets of one who has acted for the enemy, and to make them available to assist in meeting the cost of war. See *Propper v. Clark*, 337 U.S. 472, 484.” That harks back to the early case of *Ware v. Hylton*, 3 Dall. 199, 227, which said that one purpose of the seizure of enemy property is “to reimburse the expense of an unjust war”. And if enemy status caused by acting for the enemy persists after such action has ceased, there is no reason why enemy status caused by residence should not also last as long as the state of war continues.²² Nothing in the language of Section 2 suggests any distinction between “resident” and “agent” as to the application in point of time of enemy status, and if a person who was an “agent” in 1945 is still to be treated as an “enemy” in 1951 for purposes of the seizure of his property, the same would seem to be true of a “resident”.

That the appellee may have formed in 1932 or 1938 a vague intention to return to the United States at some time in the indefinite future did not render him any the less a “resident” of Japan. Residence once acquired continues until it is actually given up; “A mere floating intention, indefinite as to time, to return” is not enough. *Commissioner of Internal Reve-*

²²So to hold accords with the principle that the status of enemy-owned property may not be changed during the war. See, *Propper v. Clark*, 337 U.S. 472; *Miller v. Schutte*, 287 Fed. 604, 607, appeal dismissed, 263 U.S. 730; *Schrijver v. Sutherland*, 19 F. 2d 688, certiorari denied, 275 U.S. 546.

nue v. Nubar, 185 F. 2d 584, 587 (C.A. 4), certiorari denied, 341 U.S. 925.

That the appellee was a citizen of the United States does not change the result. Section 2 applies to an individual "of any nationality" and the courts have uniformly held that that comprehends citizens of the United States. *United States v. Krepper*, 159 F. 2d 958, 966 (C.A. 3), certiorari denied, 330 U.S. 824; *Josephberg v. Markham*, 152 F. 2d 644, 648 (C.A. 2); *Salvoni v. Pilson*, 181 F. 2d 615, 617 (C.A.D.C.), certiorari denied, 339 U.S. 981; *Miyuki Okihara v. Clark*, 71 F. Supp. 319, 322 (Hawaii); *Duisberg v. United States*, 89 F. Supp. 1019, 1022 (Ct. Cl.), certiorari denied, 340 U.S. 890. And the Supreme Court has held that to treat as enemies citizens of the United States who reside in enemy territory or who act for the enemy is within the Constitution. *Miller v. United States*, 11 Wall. 268, 305-306; *Ex parte Quirin*, 317 U.S. 1, 37. And see, *In re Territo*, *supra*.

Whether the appellee would have been "resident within" Japan for purposes of the Act if it were a question only of the period after his capture in 1945, it is unnecessary to decide, although he continued to be domiciled in Japan. He was, however, a person "resident within" Japan from December 7, 1941, until his capture, so he was still an "enemy" in 1947 when his property was vested and in 1950 when he brought this suit.

B. As an "officer" of the Japanese Government appellee was an "enemy".

It is admitted that the appellee was a commissioned officer in the medical corps of the Japanese army from December 15, 1938, on (R. 125). As such he was, after December 7, 1941, within the literal terms of Section 2(b), which includes in the definition of "enemy", the government of any nation with which the United States is at war or "any officer, official, agent" thereof. That is to be expected in a war statute; in war the opponent's military leaders are "enemies" if anyone is.²³ The District Court, however, found that the appellee's service in the Japanese army was in obedience to the laws of Japan, of which he was a national, and that after the commencement of the war between the United States and Japan such service was involuntary. It held that appellee was not an "officer, official or agent" of Japan (R. 32).

There is nothing to show that appellee's service in the Japanese army after December 7, 1941, was less or more "voluntary" than in the period 1938-1941, and there is no evidence that the entry of the United States into the war changed in any degree the character of his military service or the relation in which he stood to the Japanese Government or army or that it affected in any way his attitude or state of mind. The only difference of any kind shown in the record between appellee's pre- and post-Pearl Harbor mili-

²³The decisions to date under Section 2(b) have dealt with the term "agent", holding that spies and propagandists are within that term. *Sarthou v. Clark*, 78 F. Supp. 139 (S.D. Calif.); *Hansen v. Brownell*, 132 F. Supp. 47 (D.C.D.C.), affirmed, 234 F. 2d 60.

tary career is that on March 10, 1942, he was promoted to the rank of Captain (R. 125).

On the record the fact that the appellee was a citizen of the United States as well as of Japan had nothing to do with the voluntariness or involuntariness of his army service. During the period 1932 to 1945 he never asserted or claimed his American citizenship and never made it known in any way to either the Japanese or the United States authorities. As far as the facts in the record go, appellee acted just as if he had had only Japanese citizenship and that was the way the Japanese Government treated him. In 1932 he was any Japanese youth of twenty getting a deferment from military service to pursue his medical studies; in 1938 he was any Japanese of twenty-six who had completed his medical school course and chose to serve in the army as a medical officer. Not only is there no evidence that there was any connection between his United States citizenship and the "voluntariness" or not of his military service, it is also the fact that there is no evidence of any threats, any "putting in fear", any actual coercion to make him serve. What the appellee did he did not do under duress. Cf. *Iva Ikuko Toguri d'Aquino v. United States*, 192 F. 2d 338, 359, 360-362 (C.A. 9), certiorari denied, 343 U.S. 935.

It seems that the correctness of the District Court's finding that his military service (after December 8, 1941) was involuntary must rest on the premise that appellee's original entry into the Japanese army in October, 1938, was involuntary because it was in

obedience to the Japanese laws for compulsory military service. But to hold that the service of any enemy officer who entered the armed forces through operation of a draft law was "involuntary" in such sense as to take him out from under Section 2(b), which contains in its language no exception, would drive a hole through the Act large enough to exempt practically all of the Axis armies. Certainly in 1917 when Congress enacted the Trading with the Enemy Act, six months after the declaration of war on Germany, it knew that many of the countries of the world recruited their armies by conscription, and it must have chosen the language of Section 2(b) with that fact in mind.²⁴ That it meant to include in the term "officer" only those who had volunteered is extremely unlikely. See, *Acheson v. Maenza*, 202 F. 2d 453, 456 (C.A.D.C.); *Minoru Hamamoto v. Acheson*, 98 F. Supp. 904 (S.D. Calif.).

Assuming *arguendo* that "involuntary" service as a commissioned officer may take a man out from under Section 2(b), a reasonable rule, and one that this Court and others have applied in the somewhat analogous situation presented by the expatriation cases, is that the mere fact of induction pursuant to a conscription law is not enough by itself to make the service "involuntary". There must be an inquiry into all the circumstances, whether there was any resistance to or protest against induction, any attempt to escape service, any threats or actual duress in

²⁴See the list of countries which had conscription in 1917 set out in the footnote to the opinion in the *Selective Draft Law Cases*, 245 U.S. 366, 378.

the sense of putting into fear. The mere fact that appellee entered the Japanese army because he understood that the law required him to do so is not enough. See, *Coumas v. Brownell*, 222 F. 2d 331, 332 (C.A. 9); *Acheson v. Maenza*, *supra*; *Minoru Hamamoto v. Acheson*, *supra*; *Toshio Kondo v. Acheson*, 98 F. Supp. 884 (S.D. Calif.). And cf. *Iva Ikuko Toguri d'Aquino v. United States*, 192 F. 2d 338,, 359 (C.A. 9), certiorari denied, 343 U.S. 935.

On the facts appellee's military service was voluntary; there was no protest, no attempt to get out of serving. Moreover, whatever appellee's obligation to serve in the army was under the Japanese law, there was no obligation on him to become an officer. That was his own free and willing choice; he chose to serve the Emperor as an officer because he had been allowed to complete his medical education without interruption and because to do so would be to his advantage (R. 75-76, 161). When he chose to become an officer he was twenty-six years old and knew what he was doing. Even in the cases dealing with expatriation the courts have said that the conscript who offers to undertake more responsible or onerous duties than those required by law is to be held to have done so voluntarily. See, *Augello v. Dulles*, 220 F. 2d 344, 347 (C.A. 2); *Toshio Kondo v. Acheson*, 98 F. Supp. 884, 887 (S.D. Calif.).²⁵ In *Hansen v. Brownell*, 132 F. Supp. 47 (D.C.D.C.), affirmed, 234 F. 2d 60

²⁵That appellee could not do exactly what he wanted to do would not make what he chose to do involuntary. See, *United States v. Watkins*, 171 F. 2d 431, 432 (C.A. 2), certiorari denied, 337 U.S. 914.

(C.A.D.C.), a man who chose to serve Germany as a propagandist as an alternative to compulsory army service was held to have done so voluntarily. And see, *Kawakita v. United States*, 343 U.S. 717, 735.

It must be noted, moreover, that this is not an expatriation case, in which the Government must prove his intent to give up his citizenship by "clear, unequivocal, and convincing" evidence. *Soccodato v. Dulles*, 226 F. 2d 243, 246 (C.A.D.C.). Citizenship is not in issue here; it was stipulated in the District Court that no claim was made that appellee had lost his American citizenship (R. 39). Even as an American citizen the appellee can be an "enemy" within the Act (*supra*, p. 28), and he certainly could stand no better because he has dual citizenship.

Even as a medical officer, appellee was still an "officer" of the Japanese Government, and the language of Section 2(b) draws no distinction. In *Vowinckel v. First Federal Trust Co.*, 10 F. 2d 19 (C.A. 9), this Court, citing the Geneva Convention (35 Stat. 1885), held that a Red Cross surgeon was not an "enemy" within the Act. But Vowinckel seems to have been an officer of the German Red Cross and not of the German Government, and such exemption as might be accorded an officer of the Red Cross engaged "in alleviating the sufferings of mankind in general" should not, it is submitted, be extended to a Captain in the First Imperial Guards. As an officer of the Japanese Government the appellee was within the language of Section 2(b) and was an "enemy". And, since he was an officer from December 7, 1941,

at least until his capture in 1945, he was still an "enemy" when the property was vested in 1947. *Hansen v. Brownell*, 234 F. 2d 60 (C.A.D.C.).

CONCLUSION.

For the reasons stated the judgment of the District Court should be set aside and the action should be remanded with directions to dismiss the complaint for lack of jurisdiction.

Respectfully submitted,

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October, 1956.

(Appendix Follows.)

Appendix.



Appendix

TRADING WITH THE ENEMY ACT, AS AMENDED

(40 Stat. 411, 50 U.S.C. App. §1, et seq.).

* * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

* * *

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless

the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

* * *

SEC. 7. . . .

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the

Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * *

SEC. 8. . . .

(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the

United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case

may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.



SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President

or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation

was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further*, That notwithstanding the provisions of subdivision (C) hereof and of this subdivision (D), return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to the date of enactment of this proviso if such individual would have been a citizen of the United States at all times since December 7, 1941, but for such marriage: *And provided further*, That the aggregate book value of returns made pursuant to the foregoing proviso shall not exceed \$9,000,000; and any return under such proviso may be made if the book value of any such return, taken together with the aggregate book value of returns already made under such proviso does not exceed \$9,000,000; and for the purposes of this proviso the term "book value" means the value, as of the time of vesting, entered on the books of the Alien Property Custodian for the purpose of accounting for the property or interest involved; . . .

SEC. 33.²⁴ No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from the enactment of this amendment, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to a successor organization designated pursuant to section 32(h) hereof if notice of claim is filed before the expiration of one year from the effective date of this Act. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

* * *

²⁴Section 33 added by Public Law 671, 79th Cong., approved August 8, 1946 (60 Stat. 925). Amended by Public Law 370, 80th Cong., approved August 5, 1947 (61 Stat. 784), by Public Law 874, 80th Cong., approved July 1, 1948 (62 Stat. 1218), by Public Law 292, 83d Cong., approved February 9, 1954 (68 Stat. 7), and by Public Law 626, 83d Cong., approved August 23, 1954 (68 Stat. 767).

SEC. 39. (a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

* * *



No. 15,197

IN THE

United States Court of Appeals
For the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General
of the United States, as Successor to the
Alien Property Custodian,

Appellant,

vs.

AKIRA MORIMOTO,

Appellee.

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.

BRIEF OF APPELLEE.

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FILED

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No. 15,197

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HERBERT BROWNELL, JR., Attorney General
of the United States, as Successor to the
Alien Property Custodian,

Appellant,

VS.

AKIRA MORIMOTO,

Appellee.

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.

BRIEF OF APPELLEE.

JURISDICTION.

Appellee sued to recover property which had been vested under 50 *U.S.C.* App. Sec. 1 *et seq.*, the Trading with the Enemy Act (R. 3). The suit is, in effect, one commenced under Sec. 9(a) of the Act (R. 13). Appellee also contended in the District Court that because appellee was a citizen, the confiscation of his property under the Trading with the Enemy Act would be contrary to the Fifth Amendment to the Constitution of the United States (R. 6, 40).

After trial judgment was entered in the District Court in favor of the appellee on April 20, 1956 (R. 35). Notice of appeal was filed on June 11, 1956 (R. 36). The jurisdiction of this court is based on 28 *U.S.C.*, Sec. 1291.

STATEMENT OF THE CASE.

Appellee was born in Fresno, California, on April 18, 1912. His parents were Japanese citizens and they never acquired American citizenship. Appellee has been a citizen of both the United States and Japan at all times since his birth (Finding V, R. 31).

Appellee was taken by his parents to Japan in 1924. His parents never returned to this country. Prior to 1924, appellee had attended grammar school in Fresno, and thereafter continued his education in Japanese schools, completing grammar school and high school in Hiroshima, graduating in 1930. When appellee reached the age of twenty years he became subject to compulsory military service in the Japanese Army. He was excused from taking the physical examination because he was attending medical college and was granted a deferment until he completed his medical course. Upon completion of his medical education he reported for duty at an army camp in Tokyo and entered the Army as a medical officer candidate in October of 1938. He served as a doctor in the Army and was stationed in Manchuria until September 9, 1945, when he was captured by the Russians and taken to Siberia. He was held as a prisoner of war by the

Russians until December 4, 1948, when he was released and returned to Japan. Appellee was very ill when he was returned to Japan, such illness having been caused by malnutrition during the aforesaid imprisonment, and he returned to the United States, filed claim for the return of his property which had been vested by appellant (R. 29, 30), and commenced this action as soon as he reasonably could (Finding VI, R. 31-32).

The aforesaid service of the appellee in the armed forces of Japan was in obedience to the laws of Japan, of which appellee was a national. Such service by the appellee after the commencement of the war between Japan and the United States on December 8, 1941, was involuntary on his part (Finding VII, R. 32).

Only the last sentence of the foregoing is controverted in appellant's brief (page 8, paragraph 3).

Evidence That Appellee's Military Service Was Involuntary.

Appellee testified concerning his entry into the Japanese Army as follows (R. 59):

“Q. Were you conscripted as a private soldier in the army at that time?

“A. Yes, sir. That is the general rule that the army acts. Every people in Japan is conscripted as a soldier, but there were opportunity for the technical people, like myself, if I want to be the doctor, then they give me the position as a doctor; and if I didn't want to be a doctor, I have to be a soldier, and if I want to be a soldier I have to stay there three years in army, and if I become doctor then the year is only two years, and also the title would be doctor. There

is a little privilege for becoming a doctor officer. But in the true sense at that time that I am army doctor I am half civilian and half army because every military man we didn't have full rights as a soldier. That is the system at the time of the army."

However, the principal, and we think conclusive, basis for Judge Jertberg's decision on this point is found in the following testimony (R. 79):

"Q. What happened at the end of two years?

A. End of the two years I was enlisted as a reserve officer and also was drafted to continue my duty.

Q. Did you have any right or opportunity to drop of the service?

A. Yes, I made a petition I want to be out of the service, but that was refused.

Q. In other words, the two-year rule had been abrogated?

A. That was the promise and I was expecting to be out of the army at that time."

Corroboration for this in part is found in the following portion of a Japanese document relating to appellee's military service introduced in evidence by appellant (R. 125):

"Dec. 15, 15th year of Showa (1940).

Transferred to the Reserve and on the same dated received Extraordinary Summons Order."

Also, the State Department found in passing on appellee's application for a passport to return to this country that appellee could not have got out of the Army after January, 1940 (R. 144, 134).

Appellee's promotion to the rank of captain was an automatic promotion based upon length of service and appellee resisted pressure placed upon him to leave the reserve and join the regular army even though certain advantages would have accrued to him if he had done so (R. 81).

Evidence Relating to Domicile.

In referring to Japan in this brief, we include Manchuria, where appellee's army service occurred. Section 2(a) of the Act defines enemy territory as including that occupied by enemy armed forces. While the legal status of Manchuria during the period in question is obscure, it apparently was occupied by Japanese Forces. See *Encyclopedia Americana*, 1956 ed., vol. 18, p. 202.

On the question of residence, the issue submitted to the District Court by the parties was whether appellee was resident within Japan at the date of vesting. Appellant, however, now contends that if appellee was a resident of Japan at any time during the war, he was a resident within Japan under the Trading with the Enemy Act. In so arguing appellant relies principally on the law of domicile. We will contend under the heading "Residence" in this brief that the District Court correctly defined and decided this issue, but in view of appellant's contentions we will here discuss the evidence relating to appellee's domicile.

Since appellee was only twelve years old when he was taken to Japan by his parents in 1924, the question of his parents' domicile is material. His parents

had resided in this country from 1898 to 1924 with the exception of two years, 1917-1919 (R. 130).

Prior to the trial of this case appellant submitted to appellee a request for admission of certain facts pursuant to Rule 36. Federal Rules of Civil Procedure. Appellee's admissions and denials in response to that request were admitted in evidence in this case (R. 83-90). In paragraph 3 of that document (R. 86) appellee said:

“Plaintiff does not believe that his parents intended to permanently reside, or establish domicile, in Japan when they left this country in 1924.

“At that time plaintiff's father was in ill health and for that reason sold his business, a soft drink bottling works, and returned to Japan. He was then fifty-five years of age. He sold the business to a partnership consisting of his son Kaoru Morimoto, and one H. Kimura, even though, as plaintiff is informed, a much higher price for the business was offered by another company. The partners above-named agreed in the written contract of sale of said business not to sell the business without the consent of plaintiff's father. This indicates plaintiff's father wanted to keep the business within the family so that he would have a foothold here whenever he returned. The real property described in the complaint in this action and on which the aforesaid business was located was never sold by plaintiff's father and was owned by him until his death, at which time it went to plaintiff under his father's will. Plaintiff's father also had a 110-acre ranch in Fresno County which he kept until 1932 in spite of the hardship of maintaining it during the depression

years. Also, large sums of money were owed to plaintiff's father by people in the United States, in 1924 and up to the time of his death. In 1932 plaintiff's father obtained a passport to return to this country in order to look after his business interests, but died shortly before the scheduled sailing time."

In paragraph 4 (R. 87) of that document, appellee said:

"Plaintiff further states that the real property described in the complaint in this case was in 1924 and also at the time of the commencement of this action, occupied by both a business building and a residence, which was the residence of plaintiff's parents at the time they left the United States for Japan in 1924. Plaintiff believes that said residence would have been available to plaintiff's parents if they had returned to the United States after 1924, although it was leased to said partners for a period of five years in the agreement of sale of said premises."

Six months after his arrival in Japan in 1924 appellee's father purchased a house (R. 55). That was the only property he owned in Japan (R. 79-80). Appellant's father's ill health continued while he was in Japan and he did no business while he was there (R. 79). Concerning the home in Japan appellee testified (R. 70):

"A. Well, let me explain about this home. My father [46] purchased that home for his temporary residence, on the fact that to rent the house is very expensive, so he had some money from the financial reasons. It is more convenient

to buy the home, and so whenever he wants to come back to this country he can sell it. So I don't think he purchased the home as a permanent residence. While we were living over there naturally I considered that is my own so I return there."

Concerning his own intentions appellee testified (R. 51-52):

"Q. Was that what you had in mind, ever [22] since you went to Japan you had in mind returning here?

A. Well, at the time when I went to Japan I was so young I have no particular intention or desire, but after I attended to the medical school, that was after 20 year old, later, then I build up my intention gradually, and I wanted to come back all the time.

Mr. Aten. Yes.

The Court. Well, do I understand that after you completed your medical education——

The Witness. Yes.

The Court. In 1948——

The Witness. '38.

The Court. —'38 your intention to return was gradually developed? Is that right?

The Witness. Already at that time I was definitely trying to come back.

Q. (By Mr. Aten.) Well, I understand you to say, perhaps I was mistaken, that from the time you were 20 years old——

A. Yes.

Q. —you had that intention?

A. Intention, that is correct.

Q. So that would be 1932?

A. That is correct."

He further testified (R. 69):

“A. (By Mr. Barshay.) Do I understand correctly then that up until 1932 you had no such intention. is that correct?

A. Well, I am not sure because I was so young.

Q. Well, in 1932 you were 20 years of age, in 1931 you were 19. Did you have any such intention at that time, in 1931 when you were 19?

A. Well, I can't tell whether I had or not.”

Confirming appellee's testimony concerning his intention to return to this country is the fact that all times since he was taken to Japan in 1924 appellee had two brothers and other relatives living in the United States and the property in question, which included a residence (R. 87, 88).

Appellant's brief, page 6, cites the following testimony of appellee (R. 73):

“Q. Dr. Morimoto, while you were at various stations——

A. Yes.

Q. —in the Japanese army, mostly in Korea and Manchuria——

A. Manchuria, yes.

Q. —and Siberia, as a prisoner of war of the Russians——

A. Yes.

Q. —wasn't it true that your home was in Hiroshima at those time?

A. Yes.”

This testimony should be considered in the light of the District Court's implied finding as to appellee's credibility and the following evidence (R. 69-70):

“Q. Isn’t it a fact that at that time you considered your father’s home in Hiroshima——

A. Yes.

Q. —your permanent home?

A. Considered it home?

Q. Yes.

A. No, I didn’t consider that my permanent home.

Q. Well, did you consider it your home?

A. Yes.”

In connection with the evidence relating to domicile we point out that from the time appellee was taken away from this country until his release from prison camp in December, 1948, appellee was never a legally free person; from 1924 to 1932 he was a minor; when he attained majority he automatically became subject to conscription without even registering for the draft (R. 64), but was granted a deferment because he was a medical student (R. 68), so that during the period from 1932 to 1938 that legal obligation continued (as did his economic dependence on his family, (R. 88, 96); from 1938 to 1945 he was in compulsory military service; and from 1945 to 1948 he was a prisoner. After his release from imprisonment, he returned to this country as soon as he reasonably could, as found by the District Court (R. 31-32).

SUMMARY OF ARGUMENT.

The decision of this court in *Vowinckel v. First Federal Trust Co.*, 10 F. 2d 19 establishes that appel-

lee, who served Japan only as a doctor, was not an officer of Japan. Moreover the District Court found as a fact, based on substantial evidence, that appellee's service during the war between the United States and Japan was involuntary, and for that reason also, appellee was not an officer of Japan.

Appellee was not resident within Japan at the time of vesting. He had been for over two years a prisoner in Siberia and whether he would ever be returned to Japan was problematical. Both he and his property were, at the time of vesting, outside the control of Japan. Furthermore, appellee never had been a resident of Japan. He was born in the United States of parents domiciled here and he never lost his American domicile. He was taken from this country at the age of twelve without any volition on his part and circumstances beyond his control prevented his return until after the war.

It is at least doubtful under the Fifth Amendment that the property of an American citizen in appellee's circumstances may be confiscated and the Act should be construed to avoid that result.

The proviso in Section 8(c) of the Act, as construed by the courts, recognizes that the statute of limitations is tolled by war, and Section 33 of the Act, which is the statute of limitations therein, itself provides for its being tolled during the pendency of claims. Appellee's access to the courts of the United States was prevented by the war, and his claim was filed within the time permitted in Section 33 and is still pending.

ARGUMENT.**1. APPELLEE WAS NOT AN OFFICER OF THE
JAPANESE GOVERNMENT.**

We respectfully refer the court to Judge Jertberg's opinion on this point (R. 21-27) and to the evidence set forth under the heading "Evidence that Appellee's Military Service was Involuntary" on page 3 of this brief. Appellee was inducted into the army in 1938 for a two year period. When that period expired he petitioned for his discharge, which was refused. He resisted pressure put upon him to join the regular army. And the State Department found that he could not have got out of the army after January, 1940. The finding of the District Court that appellee's military service after December 8, 1941 was involuntary is clearly the determination of a question of fact. This court will not retry such questions. *Lew Wah Fook v. Brownell*, 218 F. 2d 924 (C.A. 9).

There is another reason for holding that appellee was not an officer of Japan. Appellee was simply a doctor and not an officer as that term is used in the Trading with the Enemy Act. Appellant's brief, pages 11 and 33, attempts to distinguish on this point the case of *Vowinckel v. First Federal Trust Company*, 10 F. 2d 19 (C.A. 9) on the ground that Vowinckel was an officer of the Red Cross rather than the German government. However, the District Court, subsequent to the opinion of this court, said in the same case (15 F. 2d 872, 874):

"The surgeons and physicians of all armies are officers of one rank or another, necessarily at-

tached to the military forces of the various powers. To ascribe to them the status of military officers, simply for this reason, would be to nullify the Convention of Geneva, as well as the presidential proclamation by which it was adopted as the law of our land. Without a clear expression of congressional intention to do so, the statute should not be interpreted to accomplish a result so undesirable. 'Acts of Parliament,' as was said before the existence of our present government, 'are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged.' *Margate Pier Company v. Hannam*, 3 Barn. & Ald. 266, 270, quoting Lord Coke." (Emphasis added.)

Factually there are similarities and differences between the *Vowinckel* case and appellee's case. Both Vowinckel and appellee entered military service before the United States became involved in war. While in military service Vowinckel treated soldiers of countries at war with Germany as well as German soldiers and also treated civilians. Appellee voluntarily treated Russians while he was a prisoner in Siberia (R. 46). Vowinckel joined the German Red Cross and apparently was called a Red Cross surgeon. There is no evidence that appellee was called a Red Cross doctor, but he was interning in a Japanese Red Cross hospital at the time he was called into military service (R. 98). In one respect at least appellee's case is stronger than Vowinckel's was, for Vowinckel's service was entirely voluntary.

It is significant that this court's opinion in the *Vowinkel* case quoted Article 9 of the Geneva Convention which deals with medical personnel generally and not simply with Red Cross personnel. The following portion of the opinion is based in part on Article 9 (10 F. 2d 21):

“While from the necessities of the case Red Cross surgeons, nurses, and chaplains are in the service of the army in time of war, they form no part of the military forces proper, and, as will be seen by reference to the convention to which the United States is a party, they shall be respected and protected under all circumstances; if they fall into the hands of the enemy, they shall not be considered as prisoners of war; they shall continue in the exercise of their functions under the direction of the enemy after they have fallen into his power; they shall receive the same pay and allowances as persons of the same grade in his own army, and when their assistance is no longer indispensable they shall be sent back to their own army or country within such period and by such route as may accord with military necessity, taking with them such effects, instruments, arms, and horses as are their private property. Under these provisions, it would seem clear that Red Cross surgeons and nurses, who are engaged exclusively in ameliorating the condition of the wounded of the armies in the field, and in alleviating the sufferings of mankind in general, are not enemies of the United States in any proper sense of that term. They may come within the letter of the statute, but they do not come within its spirit, or within the intention of Congress.”

Vowinckel was held not to be an officer of Germany even though he acted voluntarily yet appellant contends that even assuming appellee's service was involuntary after December 8, 1941, appellee was still an officer within the meaning of Section 2(b) of the Act. Appellant's brief, page 31, argues that to hold otherwise "would drive a hole through the Act large enough to exempt practically all of the Axis armies." But practically all of the Axis armies would be residents of their respective countries and so covered by the definition "enemy" in Section 2(a) of the Act.

In *Hansen v. Brownell*, 132 F.S. 47 (D.C.D.C.), affirmed, 234 F. 2d 60 (C.A.D.C.), cited page 32 of appellant's brief, both the District Court and the Court of Appeals considered the question of volition to be pertinent. The finding of the lower court was predicated on the fact that Hansen went beyond the ordinary course of duty in supplying creative talent to German propaganda.

Appellant's brief, page 32, impliedly argues that appellee voluntarily offered "to undertake more responsible or onerous duties than those required by law," but Judge Jertberg said in his opinion (R. 23): "There is nothing in the record to indicate that during his service in the Japanese Army plaintiff performed any acts or rendered any service other than in the usual and ordinary line of duty."

Furthermore, the *Vowinckel* decision on the effect of service as a doctor is a complete answer to appellant's contention.

Appellant argues that appellee should have relied on his American citizenship to escape Japanese military service. This disregards the nature of dual citizenship, a subject which is exhaustively discussed in *Kawakita v. United States*, 343 U.S. 717, 72 S.Ct. 950. The *Kawakita* case was considered in Judge Jertberg's opinion (R. 24-26) and we will therefore limit ourselves to two brief quotations therefrom. The court said (343 U.S. 725, 72 S.Ct. 956) :

“As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other.”

The court also said (343 U.S. 734, 72 S.Ct. 961) :

“It has been stated in an administrative ruling of the State Department that a person with a dual citizenship who lives abroad in the other country claiming him as a national owes an allegiance to it which is paramount to the allegiance he owes the United States. That is a far cry from a ruling that a citizen in that position owes no allegiance to the United States. Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere non-performance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan.”

Appellant cites no authority indicating that a claim by appellee of exemption from Japanese military service on the ground of his American citizenship would have any legal basis.

Appellant's brief, page 30, also relies on the claim that there was no evidence of "putting in fear". But appellee's military service began three years before the war between the United States and Japan began; and a year before the war appellee had asked to get out of the army and had been turned down. To have asked for a release after the war started would have been foolhardy as well as without legal basis. If fear is a necessary element, the circumstances establish it.

We will cite some cases in an analogous field, dealing with the alleged loss of citizenship by a dual citizen. While as stated in appellant's brief, page 33, the burden of proof in that kind of case is heavily on the government, we think the quotations hereinafter set forth have some weight and are not necessarily based on the issue of burden of proof.

In *Tomasicchio v. Acheson*, 98 F.S. 166, 174 (D.C. D.C.) the court said:

"The Government argues that the plaintiff was under a duty to protest against being drafted into the Italian army and not to submit without a contest. No doubt, however, a protest would have been futile and a refusal to take the oath would have been equally ineffective. The plaintiff might well have feared severe reprisals if he either protested or contested the order to respond to the draft. During the Fascist regime in Italy it would have been realistic to fear such an

eventuality. The Government does not restrict its solicitude to stout-hearted men. The timid, the weak, and the ignorant are equally entitled to its protection. The law does not exact a crown of martyrdom as a condition to retaining citizenship.”

Similar statements are to be found in *Okada v. Dulles*, 134 F.S. 183 (Cal. N.D.) and *Namba v. Dulles*, 134 F.S. 633 (Cal. N.D.).

In *Lehmann v. Acheson*, 206 F. 2d 592, 596-7 (C.A. 3) the court said:

“Under the Convention of 1937, as a dual citizen of the United States and Switzerland, Lehmann was obliged to submit to conscription in the Swiss Army and the American consulate in Basel could not by any attempted intervention in his behalf have contravened the terms of the Convention, nor could Lehmann’s protestations, no matter how formally registered with either the American consul or the Swiss authorities, have done so. Had Lehmann presented his American birth certificate and registered as an American citizen or sought, and even gained, the ‘protection’ of the American consulate and had he protested to the latter and the Swiss officials—all these steps would have been nothing more than a ‘magnificent gesture’, totally unavailing.”

While this statement is based in part upon the Convention of 1937, the *Kawakita* case, *supra*, indicates that the rule stated in the Convention is no different from international law generally.

In *Pandolfo v. Acheson*, 202 F. 2d 38, 41 (C.A. 2) the court said:

“(9) The appellant also argues that plaintiff’s failure to remove himself from the jurisdiction of the Italian authorities before he was called for military service in 1933 was the proximate cause of his induction and therefore the oath was taken voluntarily. But the recent decision of the Supreme Court in *Mondoli v. Acheson*, 344 U.S. 133, 73 S.Ct. 135, established that continued residence abroad after a minor citizen comes of age does not forfeit citizenship. Since the 1907 Act does not impose any duty to make an election to return to the United States when the minor comes of age, we cannot accept the argument that whatever he does thereafter in the foreign country is done voluntarily.”

2. RESIDENCE.

The District Court held that appellee was not resident within enemy territory at the time of vesting or for approximately two years prior to that date, and so was not an enemy as that term is defined in Section 2(a) of the Act. We rely on the District Court’s opinion on that point (R. 15-21). At the opening of the trial, counsel for appellant stated to the court that the issue as to appellee’s residence was “whether he was a resident in Japan at the time the property was vested in 1947” (R. 39). Appellant’s brief, pages 25-27, abandons this position and argues that if appellee was a resident of Japan at any time during the war he was an enemy even if he was not a resident at the time of vesting. In *Sacramento Suburban Fruit Lands Co. v. Melin*, 36 F. 2d 907, 909 (C.A. 9) the court said:

“Very generally is applied the rule that a theory accepted and acted upon by all in the trial court cannot be repudiated in the appellate court. *Peck v. Heurich*, 167 U.S. 624, 17 S.Ct. 927, 42 L.Ed. 302; *Westlake Merc. F. Co. v. Merritt* (Cal. App.) 262 P. 815.”

See also

Fanchon & Marco Inc. v. Paramount Pictures,
215 F. 2d 167, 170 (C.A. 9) cert. den. 348 U.S.
912, 75 S. Ct. 293.

However, assuming appellant may on appeal change the theory upon which the case was tried, we submit that the issue was correctly defined and decided by the District Court. In *Hansen v. Brownell*, 234 F. 2d 60, 61 (C.A. D.C.), the court said:

“Assuming, *arguendo*, that the property was owned by Hansen, and that the fact that he resided in France on June 26, 1951, [the date of vesting], precluded classifying him an enemy under section 2(a) of the Act on the basis of residence in an enemy country, nevertheless his propaganda employment and activities for Germany during the war made him an enemy under section 2(b) as an agent of a government with which the United States was at war.”

In three cases dealing with Section 2(a) of the Act it has been more or less assumed without discussion that the date of vesting is controlling. *Feyerabend v. McGrath*, 189 F. 2d 694 (C.A. D.C.); *Public Administrator v. Brownell*, 115 F.S. 139 (S.D. N.Y.) and *Akata v. Brownell*, 125 F.S. 6, 8 (D.C. Hawaii). It

is apparent therefore that the courts have felt that there may be some distinction between Sections 2(a) and 2(b) in this respect. The *Swiss National Insurance Company* case relied on in appellant's brief, page 25, does not support appellant's position for in that case the plaintiff's status as an enemy existed at the time of vesting. In the *Behn, Meyer & Co.* case also cited appellant's brief, page 25, plaintiff was never an enemy as defined in Section 2 of the Act, but its action was resisted on other grounds, and the court simply held that one never an enemy was entitled to recover under Section 9(a) of the Act.

Sections 2 and 9(a) of the Act define enemy in the present tense and, read literally, would allow recovery by any one not an enemy at the time suit is brought. That construction was rejected in the *Swiss National Insurance Company* case cited in the last paragraph above. Since Congress did not spell out the time for determination of enemy status, it is necessary for the courts to do so as a matter of reasonable construction. We submit that it is reasonable to hold to be non-resident, a person who was absent from enemy territory for a period of two years prior to vesting, whose person and property were entirely outside enemy jurisdiction, and whose return to Japan was problematical. (Russia is still holding possibly 10,000 Japanese prisoners. *Time*, October 29, 1956, p. 27. See also *Encyclopedia Americana* 1956, vol. 15, p. 744.)

One distinction of the residence situation from that of an enemy agent is that agency involves volition (Restatement of the Law of Agency, Section 15) and

affirmative aid to the enemy cause, whereas mere residence is a passive state.

Assuming, however, that appellant is right in contending that residence in Japanese territory at any time during the war makes one an enemy, the question of appellee's domicile may be of some relevance, although domicile is not controlling, as is pointed out in the district judge's opinion (R. 19). We submit that the evidence showed that appellee acquired American domicile at birth and never lost it.

Prior to the birth of appellee his parents had resided in this country for fourteen years and they continued to do so an additional twelve years thereafter, with the exception of a two year absence, 1917-1919. Long residence is some evidence of domicile (28 *C.J.S.* 15; 17 *Am. Jur.* 628). A person's domicile of origin is the domicile of his parents, the head of his family, or the person on whom he is legally dependant, at the time of his birth. It is generally, but not necessarily, the place of his birth (28 *C.J.S.* 10). Domicile of a minor ordinarily follows that of the father (28 *C.J.S.* 21) but that is not always true (see note 34, 28 *C.J.S.* 22). A domicile continues until another is acquired; before a domicile can be considered lost or changed, a new domicile must be acquired by removal to a new locality with intent to remain there, and the old domicile must be abandoned without intent to return thereto (28 *C.J.S.* 30). The following appears at 28 *C.J.S.* 36:

“*Original or domestic domicile favored.* Where facts are conflicting, the presumption is strongly

in favor of an original, or former, domicile, as against an acquired one, and of a domestic, as against a foreign, domicile.”

Evidence relating to the domicile of appellee and his parents is referred to under the heading “Evidence Relating to Domicile” page ⁵23 of this brief. The evidence showed that appellee’s father left this country for reasons of health in 1924. He retained a business foothold, a ranch, and ownership of a home in this country. It is reasonable to assume that he would have returned to this country if his health had improved. Appellee expressed the opinion that his parents did not intend to permanently reside or establish domicile in Japan when they left this country in 1924 and that his father did not regard his house in Hiroshima as his permanent residence. Appellee himself regarded Hiroshima as his home, but not as his permanent home. He intended to return to this country, where he had two brothers and the property in question, which included the home where his parents resided at the time they left this country in 1924. When appellee while at medical college and also at the Red Cross Hospital gave to those institutions a temporary address in Tokyo and a permanent domicile address in Hiroshima (R. 56, 57), he was simply following Japanese custom and the manner of Japanese official records (R. 102). Such records are not conclusive of domicile and can be overcome by other evidence (*Akata v. Brownell*, 125 F.S. 6, 10, *supra*).

Appellee, having been taken from this country without any volition on his part, never was free to return

to this country until he did so after the war, except while he was still a minor. When he attained majority he immediately became subject to compulsory military service. It is true that if he had done three years military service immediately after reaching the age of majority instead of asking for deferment in order to complete his education, he might have got out of the Army in 1935. However, we do not believe that his election to complete his education in Japan, at a time when he was economically dependent, was evidence of intent to relinquish his American domicile. We submit that neither appellee's father nor appellee ever lost his American domicile.

On the question of residence as defined in the Trading with the Enemy Act there are two cases with considerable factual similarity to this case. In *Kaku Nagano v. McGrath*, 187 F.2d 759 (C.A. 7) (affirmed by an equally divided court 342 U.S. 916, 72 S.Ct. 363; reaffirmed after trial, 212 F.2d 262), the plaintiff, an alien, after residing in this country for several years with her husband returned to Japan ^{in 1924} and remained there until after World War II, with the exception of a visit to the United States in the years 1932-1933. During all that time her husband continued to reside in the United States. Her reason for going to Japan was to supervise the education and marriage prospects of her children who could not enter this country. She established to the satisfaction of the court that she always intended to return to this country and the court held in spite of her actual presence in Japan

throughout the war that she was not resident within Japan. Although the plaintiff in that case had excellent reasons for being in Japan, her presence there was nevertheless entirely voluntary whereas appellee's was not.

Josephberg v. Markham, 152 F.2d 644 (C.A. 2) was an action brought on behalf of an incompetent naturalized citizen of this country who became afflicted with a mental disorder and returned to his native Italy for his health in 1931. Thereafter, both in Italy and in New York he was adjudged incompetent to deal with property. However, he was never committed to a mental institution although he spent occasional periods at a sanitarium as a voluntary patient. A majority of the court concluded that he did not have sufficient mental capacity to make his return to, and stay in, Italy voluntary acts. In summarizing its conclusions on the question of residence the court said (152 F.2d 649):

“His physical presence in Italy at the time his property was seized was a condition not attributable as a matter of law to his volition; his property could not be used to aid the enemy; he was not engaged in trade with the enemy and he could engage in no commercial activities of any kind whatsoever. He was an American citizen whose presence in Italy for reasons beyond his control did not subject his property to any control or use by an enemy government and so did not make him a ‘resident’ of Italy within the meaning of the statute and executive orders under which his property in this country was seized.”

We submit that because appellee was an American citizen and was removed from this country without any volition on his part, and was prevented from returning to this country by circumstances beyond his control, he was not resident within Japan.

3. IT IS CONSTITUTIONALLY DOUBTFUL THAT A CITIZEN'S PROPERTY MAY BE CONFISCATED UNDER THE TRADING WITH THE ENEMY ACT.

The last paragraph of the opinion in *Josephberg v. Markham*, the last case cited above, reads as follows:

“(10,11) We are bound to construe the term ‘resident’ in so far as reasonably possible in a way to avoid either invalidating the statute and orders on constitutional grounds or raising a serious doubt as to their constitutionality. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 307, 44 S.Ct. 336, 68 L.Ed.696, 32 A.L.R. 786; *Ex parte Mitsuye Endo*, 323 U.S. 283, 299, 65 S.Ct. 208; *United States v. Shreveport Grain & El. Co.*, 287 U.S. 77, 82, 53 S.Ct. 42, 77 L.Ed. 175. If the term ‘resident’ is held to include a United States citizen in the situation of *Cerutti* and the statute and orders are construed to provide for the seizure and withholding of his property in this country, held here as it is, the failure to provide any remedy for its return or for just compensation to the owner for its seizure, other than what Sec. 9(a) affords, would create such a doubt. *Becker Co. v. Cummings*, 296 U.S. 74, 79, 56 S.Ct. 15, 80 L.Ed. 54.”

Similarly the Supreme Court in *Guessefeldt v. McGrath*, 342 U.S. 308, 72 S.Ct. 338, in construing Section 39 of the Act, in a case involving an alien, said (342 U.S. 317, 72 S.Ct. 344):

“(4) Moreover, a decision for the Government would require us to decide debatable constitutional questions. In suits by United States citizens, Sec. 9(a) has been construed, over the Government’s objection, to require repayment of just compensation when the Custodian has liquidated the vested assets. *Becker Steel Co. of America v. Cummings*, *supra*; *Henkels v. Sutherland*, 271 U.S. 298, 46 S.Ct. 524, 70 L.Ed. 953; see *Central Union Trust Co. of New York v. Garvan*, *supra*, 254 U.S. at page 566, 41 S.Ct. at page 215; *Stoehr v. Wallace*, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604. Such a construction, it is said, is necessary to preserve the act from constitutional doubt.”

The court also said (343 U.S. 319, 72 S.Ct. 344):

“Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited.

“(6) The concern of the Trading with the Enemy Act with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes.”

We do not contend that there is any case holding that the property of a citizen of the United States who comes within the definition of enemy in Section 2 of the Act may not be confiscated. On the other hand we know of no case that holds the contrary, in which the constitutional problem was discussed. (There are cases so holding where the constitutional problem was not discussed; see the first group of cases cited appellant's brief, page 28, but *Josephberg v. Markham*, supra, should be excluded from that group and *Feyerabend v. McGrath*, supra, should be added thereto). *Miller v. United States*, 11 Wall.269 cited appellant's brief page 28 was not decided under the Trading with the Enemy Act. It does support the proposition that confiscation of the property of citizens is a constitutional exercise of the war power given to the Congress by the Constitution; however, the case assumes that the war power is in this respect, unlimited, which seems contrary to the above statement in the *Guessefeldt* case. *Ecker v. Atlantic Refining Company*, 222 F.2d 618 (C.A. 4) sustained the constitutionality of the seizure of the property of a citizen but that case was not an action under Section 9(a) of the Act. Instead, the plaintiff attacked the validity of the vesting of the property and the action was not against the Attorney General but against a party who had purchased from the Attorney General. (The government had already voluntarily paid over to plaintiff the proceeds of sale less costs of administration and income tax.) We do not contend that the vesting of appellee's property was wrongful, for there was perhaps

reasonable ground for believing that it might be enemy owned property. We do, however, contend that appellee is entitled to return of the property under Section 9(a). The court said in the *Guessefeldt case*, 342 U.S. 313, 72 S.Ct. 341:

“It is clear that the custodian can lawfully vest under Sec. 5 a good deal more than he can hold against a Sec. 9(a) action.”

We submit that appellee committed no act justifying the confiscation of his property and is entitled to its return or to be compensated therefor under the Fifth Amendment; or that there is at least such doubt on the point that the Act should be construed so as to avoid such confiscation.

4. STATUTE OF LIMITATIONS.

The first sentence of Section 33 of the Trading with the Enemy Act establishes the time limit for the filing of claims. The part of Section 33 which is immediately relevant here is the second sentence thereof reading as follows:

“No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.”

Appellee's property was vested on December 9, 1947 (R. 29). At that time he was a prisoner of war in Siberia and remained such until December 4, 1948, when he was released and returned to Japan (R. 31). He returned to the United States and commenced this action as soon as he reasonably could, as found by the trial court (R. 31-32). The action was filed in his behalf on October 23, 1950 (R. 13) and the date of his return was December, 1950 (R. 15). The District Court held that the statute of limitations was tolled under these circumstances.

Osbourne v. United States, 164 F.2d 767 (C.A.2) was an action filed under a United States statute against the United States and others on account of injuries that were allegedly caused by the negligence of defendants shortly before December 8, 1941. On that date plaintiff was interned by Japan and he was returned to this country in October, 1945. The court held that the statute of limitations was tolled during the plaintiff's internment. The court said (page 769):

“The Hanger case [73 U.S. 532] has been consistently followed in the federal courts. Its doctrine has been applied not only where the plaintiff was a citizen of the United States, but also where he was an enemy alien during a war. It has also been applied where the statute of limitations was of the substantive type involved here, not the ordinary type as in the Hanger case, because the considerations for so tolling the ordinary statute apply also to the special type. State courts, facing the same problem in cases involving limitations provisions in wrongful death

statutes, have held that the statute should toll for enemy aliens, despite silence on the subject in the statute itself.

“We see no reason why the Hanger doctrine should not govern here. The cases cited show there would be no doubt that a Japanese citizen employed as appellant was on the S.S. President Harrison would have been able to sue for similar injuries. It would seem the height of unreasonableness to grant such redress to one of our former enemies at the same time we denied it to a citizen who, through no fault of his own, was held prisoner by that enemy.

“Neither do we think that distinction should be made because of the type of statute of limitations involved. All statutes of limitation are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed. Whatever the reasons for describing this type of statute of limitations as substantive rather than procedural—and we suspect the chief reason was to make the period of limitation named in the statute, rather than that of the form, control in cases brought in state courts—we think we do the distinction no violence by holding that either type of statute will toll for one who is a prisoner in the hands of the enemy in time of war.”

Marcos v. United States, 106 F.S. 172, 122 Ct. Cl. 641, was an action against the United States for the value of cattle requisitioned by the United States

Army in the Philippine Islands during World War II. The court said (106 F.S. 176-177):

“On the other hand when a suit cannot be filed within the normal period of limitations because of the existence of a state of war, the result is not attributable to any personal defect of the claimant, but rather to the international acts of nations for which all citizens are responsible. A superior power closes the courts to litigation with the enemy during such a period. The effect of the outbreak of war is to *suspend the normal operation* of the Statute of Limitations, and with the return of peace the Statute revives and continues to operate in the normal manner.”

The court further said (page 177):

“We, therefore, reaffirm the principle adopted in our earlier decision in this case that war, unlike ‘legal disabilities,’ impliedly suspended the normal operation of the Statute of Limitations, and that with the return of peace, plaintiff, whose cause of action accrued after the outbreak of war, had six years within which to file his suit.

“The fact that plaintiff was an ‘enemy’ under the definitions of the Trading With The Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.A. Appendix, Secs. 1-39, does not alter our above-stated conclusions. Rather, we find that Congress expressly provided in Section 8(c) of the Aact that the running of the Statute of Limitations should be suspended in certain designated situations, not herein material, and then concluded as follows:

“ * * * *Provided, however,* That nothing herein contained shall be construed to prevent the sus-

pension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.’

“In enacting this provision Congress had before it, as part of the Senate Reports accompanying the bill, a legal memorandum which listed the authorities holding that war suspended the operation of the Statute of Limitations. S.Rept. 111, 65th Cong., 1st Sess., pp. 21, 22; S.Rept. 113, 65th Cong., 1st Sess., pp. 21, 22. In light of the fact that Congress was fully informed of the leading decisions, it is our opinion that Congress did not intend by enacting the Trading With The Enemy Act to alter the existing state of the law, but merely intended, by incorporating Section 8(c) into the Act, to confirm the general principle which suspends the running of the Statute of Limitations against the ‘enemy’ while that status exists. *First National Bank of Pittsburgh v. Anglo-Oesterreichische Bank*, 3 Cir., 37 F.2d 564, 567.”

In the District Court appellant sought to distinguish the *Osbourne* case, supra, on the ground that the plaintiff in that case was imprisoned by Japan, an enemy country, whereas appellee was imprisoned by Russia, an ostensible ally. However, it is a matter of judicial notice that Russia is behind an Iron Curtain (*In re Kleins Estate*, 123 N.Y.S.2d 866, 870). In *People ex rel. Choolokian v. Mission of Immaculate Virgin*, 76 N.Y.S.2d 509; modified and affirmed 300 N.Y. 43, 622, 88 NE 2d 362, 90 NE 2d 486; cert. den. 339 U.S. 912, 70 S.Ct. 570, the court said (76 N.Y.S.2d 512):

“From an exchange of notes between the State Department of our Government and the Soviet Government in April and May 1947, it appears that ‘notwithstanding all their personal efforts and the repeated representations of the American Embassy in Moscow’ the Soviet Government for some time has refused to permit American citizens to leave Soviet territory for the United States and has even refused to permit representatives of our Government to interview such citizens. It has also refused to permit American citizens to bring their wives back to this country. Probably at no other time in our history as a nation have we been confronted with a situation where our citizens have been treated virtually as prisoners by a foreign power with whom we are at peace. Recent reliable reports from France indicate that their citizens are similarly treated by the Soviet. New York Herald Tribune, December 23, 1947, page 1.”

There is evidence that similar conditions still prevail. 102 Congressional Record, p. A6218. We submit that appellee had no access to the courts of the United States during his imprisonment in Siberia.

In the *Marcos* case, *supra*, the war was held to have terminated as to the Philippines on the date of the surrender of Japan, which “marks the restoration of the right of free commercial intercourse, and of access to this court.” (106 F.S. 178). Appellee’s access to the courts of this country was not restored until at least April 6, 1949. In House Report No. 1114, 83rd Congress, 2nd Session, dealing with the

1954 amendment to Section 33, the following appears with reference to persons in Japan:

“However, such persons were unable to file for the return of their property until 24 days before the expiration of the statutory period because of regulations of the occupation authorities in Japan which prohibit transmittal to the United States of ‘papers of legal procedure.’ ” U.S. Code Congressional and Administrative News, 1954, Vol. 2, page 1998.

This action was filed October 23, 1950, less than two years after access to the courts became available to appellee.

In attempting to distinguish the *Osbourne* case and the Supreme Court cases upon which it relies, appellant’s brief, page 17, states:

“To apply that rule to Section 33 would be to say that in 1946 Congress enacted a statute of limitations which would come into effect it knew not when, and that, when in 1948 it put the date of April 30, 1949, in Section 33, it did not expect that date to have any effect.”

We do not believe that this is correct. In *Guessefeldt v. McGrath*, 342 U.S. 308, 72 S.Ct. 338 the dissenting opinion (there is nothing to the contrary in the majority opinion) said (342 U.S. 325-326, 72 S.Ct. 47-8):

“The primary purpose of Section 9(a)—to provide for judicial return of property mistakenly seized from American citizens or nations of friendly countries—is preserved.”

and in the note to the foregoing statement is the following:

“13. Section 9(a) was originally designed to protect American citizens, S.Rep. No. 111, 65th Cong., 1st Sess. 8 (1917), and apparently the bulk of the claims filed under Sec. 9(a) are those of American citizens. Hearings before Senate Committee on the Judiciary on H.R. 4044, 80th Cong., 2d Sess. 44 (1948).”

Most American citizens reside in this country and only a small number of them were deprived of access to the courts by the war.

It must be presumed that when Congress enacted Section 33 of the Trading with the Enemy Act in 1946, Congress was aware of the court decisions tolling the statute of limitations on account of war. In 82 C.J.S. 794 the law is stated as follows:

“All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it, . . .; they are therefore to be construed in connection with and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, that is, they are to be construed with reference to the whole system of law of which they form a part. So the meaning and effect of statutes are to be determined in connection, not only with the common law, . . ., and the constitution, but also with reference to other statutes, . . . and the decisions of the courts;”

See also *Globe etc. Ins. Co. v. Draper*, 66 F.2d 985, 991 (C.A. 9); *In re Big Blue Min. Co.*, 16 F.S. 50, 52

(N.D. Cal.). These principles are particularly applicable here, for Section 33 was added to an act in which Section 8(c) already recognized the tolling of statutes of limitation by war, as held in the *Marcos* case, *supra*.

One further matter on this phase of the case requires discussion, the proviso at the end of Section 33 reading:

“but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.”

Appellee's claim is still pending (R 30, Finding III) and it was filed within the time prescribed by Section 33 as amended in 1954 (appellant's brief page 16). It was not filed prior to the end of the two-year period referred to in said proviso. However, in *First Nat. Bank of Portland v. McGrath*, 97 F.S. 77 (D.C. Ore.) the court held that the effect of said proviso is not simply to add to the two-year period referred to therein the time in that period during which the claim was pending. In that case, the claim was filed eight months and eight days before the end of the two-year period, but the action was not filed until 18 months and 28 days after the end of the period. The court said (page 80):

“(3, 4) Section 33 provides in part, ‘* * * but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 * * * hereof.’ While this provision might have

been more precisely drawn, it would appear that Congress intended to follow the general pattern of statutes of limitation and provide for the tolling of the statute in those instances in which claims were timely filed. To hold otherwise would be, in the language of the Court in *Stadtmuller v. Miller*, 2 Cir., 11 F.2d 732, 739, 45 A.L.R. 895, “* * * to impute to Congress an intention which the act does not in our opinion, warrant, and which is so repugnant to our ideas of justice and equity and that we cannot believe that Congress ever intended such a result.’”

This decision evidently impressed appellant’s trial counsel for at the outset of the trial of appellee’s case counsel stated that the statute of limitations was not in issue, giving as one reason:

“Incidentally, the law has been changed anyway and the time for filing claims has been extended, so that question is moot.” (R. 38)

After the noon recess counsel, however, reserved the right to raise the question of the statute of limitations on appeal (R. 82).

First Nat. Bank of Portland v. McGrath, supra, was decided before 1954. It is the only case we have seen which discusses the proviso in question. *Pedersen v. Brownell*, 129 F.S. 952 (D.C. Ore.) and *Grabbe v. Brownell*, 140 F.S. 4 (E.D. N.Y.) cited appellant’s brief, page 16, were decided after the 1954 amendment to Section 33 but did not refer to the aforesaid proviso. The *Pedersen* case was decided by the judge who decided the *First Nat. Bank of Portland* case, but the later decision did not refer to the earlier one.

The failure of Congress to amend the second sentence of Section 33 in 1954 may indicate an intent not to extend the time for filing suits. On the other hand, Congress also chose not to alter the proviso in question. We submit that since appellee's claim was timely filed, the time for filing suit was tolled during the pendency of the claim.

CONCLUSION.

Appellant has not shown any error in the record, or any justification for confiscating appellee's property, and the judgment should be affirmed.

Dated, Fresno, California,
November 23, 1956.

Respectfully submitted,
JAMES KUBOTA,
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(Appendix Follows.)

Appendix.

Appendix

TRADING WITH THE ENEMY ACT, AS AMENDED

(40 Stat. 411, 50 U.S.C. App. §1, et seq.).

* * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

* * *

SEC. 8. . . .

(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing

any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the

money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment

or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * *

SEC. 33.²⁴ No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from the enactment of this amendment, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to a successor organization designated pursuant to section 32(h) hereof if notice of claim is filed before the expiration of one year from the effective date of this Act. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the prop-

²⁴Section 33 added by Public Law 671, 79th Cong., approved August 8, 1946 (60 Stat. 925). Amended by Public Law 370, 80th Cong., approved August 5, 1947 (61 Stat. 784), by Public Law 874, 80th Cong., approved July 1, 1948 (62 Stat. 1218), by Public Law 292, 83d Cong., approved February 9, 1954 (68 Stat. 7), and by Public Law 626, 83d Cong., approved August 23, 1954 (68 Stat. 767).

erty or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

* * *



No. 15,197

**United States Court of Appeals
For the Ninth Circuit**

HERBERT BROWNELL, JR., Attorney General
of the United States, as Successor to the
Alien Property Custodian,

Appellant,

vs.

AKIRA MORIMOTO,

Appellee.

**Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.**

**REPLY BRIEF OF HERBERT BROWNELL, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
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No. 15,197

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**REPLY BRIEF OF HERBERT BROWNELL, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT.**

This reply brief will be directed only to Point 4
(Statute of Limitations) of appellee's brief.

1. SECTION 33 SHOULD BE APPLIED AS WRITTEN.

Under his Point 4 appellee argues that the general
rule is that a statute of limitations is tolled by war,
and that this rule applies to suits against the United

States, citing *Osbourne v. United States*, 164 F. 2d 767 (C.A. 2), and *Marcos v. United States*, 122 Ct. Cl. 641, 106 F. Supp. 172.

But when Congress passes an ordinary statute of limitations for suits based on employers' liability (*Osbourne*) or in the Court of Claims (*Marcos*),¹ it has in mind the conditions and problems of peace time; war is a factor not within the contemplation of such statutes, so it is not unreasonable to read them as subject to an implied exception that they shall be suspended when war makes their application unfair. But the "general rule" as to the tolling of statutes of limitations by war does not express a constitutionally guaranteed right; it is at most a rule of construction, and there is no question but that Congress may, if it deems it advisable, enact a statute of limitations which will not be tolled by war or by the resulting denial of access to the courts, provided only that it leaves open to claimants a reasonable opportunity to assert their rights.

Our position is that that is what Congress did when it enacted Section 33 in 1946 and amended it in 1948, that it enacted a statute of limitations which applied to wartime seizures under a wartime statute, and which was not to be tolled by reason of war or of the conditions resulting from war, such as imprisonment as a prisoner of war.

¹We do not rely on any special position of the United States with respect to statutes of limitations in general or on any distinction between "substantive" and "procedural" statutes, such as is mentioned in *Osbourne*.

In 1946 when Congress added the original Section 33 to the Trading with the Enemy Act and in 1948 when it amended it to change the time limits on both claims and suits, the United States was still at war with Japan and Germany, and no one could predict when the treaties of peace would be signed.² So when it set April 30, 1949, as one of the time limits on suits, or two years from the date of vesting, as far as Congress could foresee when it enacted and amended Section 33, those time limits might, and probably would, arrive and be passed while a state of war and the conditions resulting from war still continued. The only reasonable conclusion would seem to be that Congress intended the dates it set to govern the filing of claims and of suits notwithstanding the continuance of the war.³

What Congress did in Section 33 in 1946 and 1948 was to lay down a rule which would, as far as it could foresee, allow a reasonable opportunity for all claimants to sue, or to file claims even if they were not entitled to sue. And when Congress set the time limits in Section 33 it had before it the fact that there were persons in situations similar to that of the appellee and who, for reasons connected with the war, needed

²In fact the state of war with Germany continued until October 19, 1951, and with Japan until March 20, 1952. Appellant's Opening Brief, p. 16, n. 12.

³Appellee seems to argue that Congress did not intend Section 33 to apply to American citizens (Brief, pp. 35-36). There is no trace of any such distinction in the language of Section 33, and it seems impossible that Congress should have intended any such exception without saying so. The language of Section 33 is, "*No suit pursuant to section 9 may be instituted . . .*" (italics added).

additional time to assert their claims. At the same time it wanted to set an over-all limit. In the appendix to this brief we have reprinted the March 25, 1948, letter of Peyton Ford, then The Assistant to the Attorney General, to the Speaker of the House, which was the starting point of the 1948 amendment (App. pp. i-iv). In that letter Mr. Ford pointed out that there were many persons who needed additional time, such as persons in occupied countries, in displaced-person camps, or who, by reason of war conditions, had not been able to become aware of their privileges under the Act. It was with that letter before it that Congress set the time limits on suits of April 30, 1949, or within two years from vesting.⁴ The only conclusion possible is that Congress meant those time limits to be applied as written and not to be subject to tolling, and intended that the time limits should apply to persons, like the appellee, who had been cut off from communication by the war, because it was precisely that class of persons who furnished the reason for the 1948 amendment.

On the facts of this case the time limits set by Congress on suits in 1948 were reasonable and proper. The appellee was in a prisoner-of-war camp until December, 1948; then he was in occupied Japan. His right of access to the courts of the United States was restored by April, 1949 (Appellee's Brief, pp. 34-35), and it was in that month that he applied to the United States consulate in Yokohama (R. 49). The time

⁴Significantly, Congress did not extend the time as much as Mr. Ford suggested.

limit of two years from vesting gave him until December 17, 1949, to file his claim and bring his suit, over eight months. That was a reasonable allowance of time and there is no constitutional reason why it should not be applied according to its terms. *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 562; *McCoskey & Co. v. Eckart*, 164 F. 2d 257, 260 (C.A. 5).

Our position is that Section 33, as amended in 1948, was intended by Congress to be applied without exceptions other than the one exception written into its language, which provides for the exclusion of the time while a claim or suit is pending in computing the two years after vesting. As to the effect of that proviso the appellee appears to misunderstand our position, for he relies on what he says was the holding in *First Nat. Bank of Portland v. McGrath*, 97 F. Supp. 77 (Oregon), that the effect of the proviso is not “simply to add to the two-year period . . . the time *in that period* during which the claim was pending” (italics added). The implication seems to be that our position is that if the appellee filed his claim November 17, 1949, one month before the two-year period ended, he would have obtained by filing only one additional month, or until January 17, 1950, in which to sue. The question is academic, for appellee did not actually file any claim until October 17, 1950 (R. 5), but it may clarify our position for the Court to restate it. Our position is that the timely filing of a claim stops the running of the period for as long as his claim is pending, no matter how long that may be. If ap-

pellee had filed a claim in November, 1949, and if it were still pending, the two-year period, from which the time of pendency is to be excluded, would not have expired yet.⁵

In this connection the appellee makes the surprising assertion (Brief, p. 38), that the *First Nat. Bank* case is the only one counsel has seen which discusses the effect of the proviso in Section 33. The proviso was discussed in *Pass v. McGrath*, 192 F. 2d 415 (C.A. D.C.), from which we quoted on page 15 of our opening brief; in *Cisatlantic Corporation v. Brownell*, 131 F. Supp. 406 (S.D. N.Y.); and in *Grabbe v. Brownell*, 140 F. Supp. 4 (E.D. N.Y.). In the *Cisatlantic* case the Court, as appears from the opinion, in computing the two years, did exclude the time during which the claim was pending.

The net result of those cases is that once the two-year period has expired it will not be re-opened by the later filing of a claim. That is what happened here; the two years from the vesting of appellee's property expired December 17, 1949, and he did not file a claim before October, 1950, at the earliest, or nearly a year after his right to sue had been lost.

In connection with the filing of appellee's claim, he seems to misunderstand the effect of the 1954 amendment to Section 33, which extended for one year from its date the time for filing claims but left unchanged the time limits on filing suits, by April 30, 1949, or two years after vesting, whichever was later.

⁵In the case cited the claim was filed within the two years, and the holding was that the two-year period was tolled as long as the claim was pending.

The filing of a claim is a condition precedent to suit (*LaDue & Co. v. Brownell*, 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823), and the 1950 filing of appellee's claim having been retroactively approved by the amendment, appellee argues that it follows that his suit was also timely (Brief, pp. 37-38). But it does not follow from the fact that a claimant must file a claim before he may sue that every person who files a claim is entitled to sue. The filing of a claim for the return of property under the Act has a dual function; in addition to being a condition precedent to suit under Section 9(a), it is also an application for an administrative and discretionary return under Section 32, which was added to the Act in 1946. The claims of American citizens are to be considered under Section 32, but the primary purpose of that Section was to authorize the return of property to classes of "enemies" who, Congress thought, should get their property back, but who were not entitled to sue under Section 9(a). *Guessefeldt v. McGrath*, 342 U.S. 308, 314-315. So an extension of time for the filing of claims did not imply an extension of time for suits, and the argument that it did was rejected in *Grabbe v. Brownell*, 140 F. Supp. 4 (E.D.N.Y.), and *Pedersen v. Brownell*, 129 F. Supp. 952 (Oregon).

Appellee cites (pp. 34-35) House Report No. 1114, 83d Cong., 2d Sess., dealing with the 1954 amendment. But a reading of that Report discloses that in passing that amendment Congress was occupied with the problems of Section 32, which provides for discretionary administrative returns, and not with Section 9(a). The law is well settled that Section 32 has nothing to do

with suits and that action under it is not subject to judicial review. *McGrath v. Zander*, 177 F. 2d 649 (C.A.D.C.); *Tiedemann v. Brownell*, 222 F. 2d 802 (C.A.D.C.). It follows that there is no implication that because Congress extended the time for filing claims, it meant also to extend the time for suits. As we have seen, in 1954 Congress left unchanged the time limits on suits it had set in 1948. The only possible conclusion would seem to be that it did not intend to change those limits.

We submit that the intention of Congress, as manifested in the 1948 amendment to Section 33, was to bar *all* suits for the recovery of vested property which were not brought by April 30, 1949, or within two years after vesting, whichever was later.

Respectfully submitted,

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LAUGHLIN E. WATERS,

United States Attorney for the
Southern District of California,

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Attorneys, Department of Justice,

Attorneys for Appellant.

December, 1956.

(Appendix Follows.)

Appendix.



Appendix

Department of Justice.

Office of the Assistant to the Attorney General
Washington, March 25, 1948.

The Speaker, the House of Representatives.
Washington, D. C.

My Dear Mr. Speaker:

This Department invites your attention to the desirability of amending section 33 of the Trading With the Enemy Act in order to extend the time for filing claims under sections 9 and 32 of that act.

Section 32 was first enacted in March 1946 (60 Stat. 50). It was amended and section 33 was added in August 1946 (60 Stat. 930; 60 Stat. 925). Both sections were amended in August 1947 (Public Law 370, 80th Cong., 1st sess.).

Section 32 permits return of vested property to any persons save those in certain defined categories hostile to the United States. Among those to whom return is permitted are persons who were enemies under the act only by reason of residence in occupied countries during the war and persons who were persecuted by an enemy government during the war. Section 33 originally provided that claims for return under section 32(a) and section 9(a) must be made within 2 years of the vesting of the property or by August 8, 1948 (2 years from the passage of sec. 33), whichever should be later. In July 1947, Italians were for the first time made eligible to receive returns under sec-

tion 32(a). In order to give Italians the 2 years for filing of claims enjoyed by other claimants, section 33 was amended to permit filing of Italian claims until July 31, 1949.

It now appears that the 2 years allowed for the filing of claims has proved insufficient in the case of many claimants. Until recently, many of the occupied countries have been in a disorganized condition in which communication has been restricted and it has been difficult if not impossible for claimants resident in such countries to file claims. Moreover, many potential claimants have been necessarily preoccupied with the problems of day-to-day existence. The plight of the victims of persecution has been even more arduous. Most of them are presently either in displaced-person camps or dead. Many are presumably unaware of their privileges under the act and, despite the earnest efforts of this Department, will probably continue to be so for some time in the future. Only a very small number of such persons have thus far been able to file claims. The heirs of deceased victims of persecution (who also may file claims under sec. 32), some of whom are American citizens, are in many cases ignorant of the existence of the vested property, or of the fact that they are the heirs, or both. Unless the statute of limitations is extended, the purpose of Congress will be frustrated in many deserving cases.

The proposed amendment would accomplish three main purposes: First, it would extend from August 8, 1948, to July 31, 1949, the statute of limitations on claims filed pursuant to sections 9 and 32 of the act

in cases involving property vested during World War II. In addition, where the August 1948 limiting date on the filing of claims and suits is retained, the date is changed from August 8 to August 9, it having been observed that August 8 falls on Sunday. Second, the statute of limitations governing subsection 9(a) proceedings would be made applicable to all proceedings under section 9. Third, it would simplify section 33. The section is presently embodied in two statutes (60 Stat. 925 and Public Law 370, 80th Cong., 1st sess.), a consequence of separate legislation in respect of Italian-vested property providing, among other things, a different period of limitations for such property than is applicable to other property. The proposed legislation would erase distinctions which the passage of time has made unnecessary and treat all World War II claims uniformly.

The extension of slightly less than a year which is here proposed would do much to alleviate the situation. The filing of stale claims would not be encouraged since, even with the extension, the entire period during which claims might be filed (i.e., from the enactment of sec. 32 to July 31, 1949) would be less than 3½ years.

Section 33 makes no provision for limitations in any proceedings under section 9 except those under subsection (a). This apparently inadvertent omission may have occurred because only subsection (a) has come into sufficiently general play in World War II to command attention. Nevertheless, there may be some claims from World War I under other subsec-

tions of section 9 which are controlled by no statute of limitations at present. While we are confident that such claims, if they exist at all, are not important, it would seem desirable, in the interest of good order, to be able to close the books in respect to such possible claims after the stated time.

A proposed bill to effectuate the foregoing suggestions is enclosed.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,
Peyton Ford,
The Assistant to the Attorney General.

No. 15,197

IN THE

United States Court of Appeals

For the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,

Appellant,

vs.

MORIZO NAKASHIMA,

Appellee.

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

JAMES KUBOTA,

IRVINE P. ATEN,

RICHARD V. ATEN,

426 T. W. Patterson Building,

Fresno 21, California,

*Attorneys for Appellee
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FILED

APR 29 1957

PAUL P. O'BRIEN, CLERK

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No. 15,197

IN THE

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HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,
Appellant,

VS.

MORIZO NAKASHIMA,

Appellee.

**Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.**

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable James Alger Fee and Frederick G. Hamley, Circuit Judges, and Chase A. Clark, District Judge:

Appellee respectfully petitions for a rehearing of the above entitled case, as follows:

This petition is based on two considerations: First, the exception in 28 U.S.C.A., Section 2401(a) in favor of persons "beyond the seas"; and second, factors in addition to the shortness of the period of limitation showing the inadequacy under the Constitution of the

remedy afforded, under the Trading with the Enemy Act, for the return of property mistakenly seized.

THE “BEYOND THE SEAS” EXCEPTION IS APPLICABLE.

Appellee was a citizen of the United States and was a prisoner in Siberia at the time his property was seized. He did not return to the United States until December, 1950. (R. 31-32.) This action was filed on his behalf in October, 1950. (R. 13.) The “beyond the seas” provision is applicable to American citizens who are out of this country. *Arribas v. United States*, 110 F. Supp. 267 (Ct. Cl.).

28 U.S.C.A., Section 2401(a) reads:

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

This is a modification and condensation of a provision of the Tucker Act, *United States v. Glenn*, 231 F. 2d 884 (C.A. 9) cert. den., 77 S.Ct. 223. A substantially identical provision applicable to Court of Claims actions was considered in *Soriano v. United States*, 352 U.S. 270, cited in the opinion in the case at bar (see notes 1 and 9 in the *Soriano* opinion).

At the time of *United States v. Greathouse*, 166 U.S. 601, 41 L.Ed. 1130, the Tucker Act contained no provision corresponding to the second sentence of Section

2401(a) but it did have a provision similar to the first sentence of that section. The Tucker Act superseded but did not repeal U. S. Rev. Stat., Section 1069, which dealt with the jurisdiction of the Court of Claims. Said Section 1069 included a provision similar to the second sentence of Section 2401(a). The holding of the court was based on the following principle (166 U.S. 605, 41 L.Ed. 1131):

. . . But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them.

In the case at bar, there is no issue of repeal by implication but a similar rule is pertinent. "General and special statutes should be read together and harmonized, if possible". 82 C.J.S. 839; *Skelton v. United States*, 88 F. 2d 599, 603-4 (C.A. 10); *United States v. Farley*, 92 F. 2d 533, 536 (C.A.D.C.). The court said in the *Greathouse* case (166 U.S. 605-606, 41 L.Ed. 1131):

In conformity with this principle we must adjudge that the above proviso of U.S. Rev. Stat. Section 1069, is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently that the claim of a person who was beyond the seas at the time claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits "under this (that) act," without making any exception in favor of

persons under disability, it should be interpreted, as if the proviso in U.S. Rev. Stat. Section 1069 were added to Section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result.

Since the second sentence of Section 2401(a) is not "absolutely inconsistent" with Section 33 of Trading with the Enemy Act, the "beyond the seas" provision in 28 U.S.C.A., Section 2401(a) is applicable in favor of appellee.

We do not believe that this contention is inconsistent with *United States v. Glenn*, supra, which holds that the second sentence of Section 2401(a) is not applicable under Subdivision (b) of that section, dealing with Tort Claims. The *Glenn* decision was based in part on the structure of Section 2401 and the relationship of the two subdivisions thereof, a factor not applicable here, and the plaintiff's right in that case was purely statutory whereas appellee's right is based on the Constitution. If those factors had not been present in the *Glenn* case, the reasoning in Judge Stephens' dissenting opinion might have prevailed. *Williams v. United States*, 228 F. 2d 129 (C.A. 4) cert. den. 351 U.S. 986, reached a result similar to the *Glenn* case, where the cause of action was purely statutory. Neither case cited *United States v. Greathouse*.

THE CONSTITUTIONAL QUESTION.

The opinion in the case at bar says (page 7) :

The power of Congress to provide for an immediate seizure in war times of property supposed to belong to the enemy is dependent upon adequate provision being made for its return in case of mistake. *Central Trust Co. v. Garvan*, 254 U.S. 554, 566. Whether adequate provisions for such return has been made depends, among other things, on whether the period of limitation for the bringing of suits for return of seized property is reasonable.

We submit that if the statute of limitations under the Trading with the Enemy Act is held not to include the exception of person under legal disability and “beyond the seas”, the statute is unreasonable when considered in the light of the factors hereinafter mentioned.

The said exception has been regarded as an element of a just statute of limitation since the year 1623. In *Hanger v. Abbott*, 6 Wall. 532, 538, 18 L.Ed. 939, 942, the court said :

When our ancestors immigrated here, they brought with them the Statute of II, Jac. I. ch. 16, entitled “An Act for the Limitation of Actions, and for Avoiding of Suits of Law,” known as the statute of limitations. . . . Such statutes exist in all the states, and with a few exceptions they have been copied from the one brought here in colonial times. . . . Persons within the age of twenty-one years, *femes covert*, *non compos mentis*, persons imprisoned or beyond the seas, were excepted out of the operation of the 3d section of

the act, and were allowed the same period of time after such disability was removed. Just exceptions, indeed, are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence.

In contrast with the regard shown for the exceptions in the *Hanger* and *Greathouse* cases, it was held in *Vance v. Vance*, 108 U.S. 514, 27 L.Ed. 808, that an exception in favor of minors is not essential to the constitutionality of State statute of limitations. The court said (108 U.S. 521, 27 L.Ed. 811):

... The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. No such provision is made here for such exception, but, in place of it, the Legislature has made it the duty of the proper officer of the court to act for them.

We believe that the last sentence of this quotation distinguishes the *Vance* case from the case at bar.

If Section 33 is not subject to the usual exception in favor of persons under disability, that fact should be considered in connection with other factors outlined in the committee report dealing with the 1954 amendment of Section 33 referred to in the opinion in this case (note 7). These factors affected a class of persons sufficiently large to justify enactment of the 1954

amendment; and they could have been foreseen when Section 33 was adopted in 1946. The report said in part:

The need for the present legislation revolves around the adequacy of the notice given to claimants of their rights and the adequacy of time within which such claimants could file their claims. Most of the persons whose property has been vested have, for a large part, been located abroad. Thus, while notice was published in the Federal Register, the notice was frequently never communicated to persons with residence abroad. . . .

From the evidence before the committee, it is evident that notice of the right to file for the return of property did not come to the attention of a substantial number of interested persons. In many cases, this was by virtue of the serious dislocations in the world as an aftermath of war. In others, it was because governments were involved in the reconstruction of their devastated countries and were only able to give incidental attention to problems such as these. In still other cases, as illustrated above, the rights of some claimants were not sufficiently ascertainable prior to the deadline in order to enable them to pursue the remedy available to them. . . . (1954-2 U.S. Code Cong. & Ad. News 1997, 1998.)

In view of these circumstances, foreseeable when the statute was enacted, a two years statute of limitations with no exception for persons under disability would be unreasonable, for it would inevitably deny to a large number of persons the remedy which the Constitution requires in case of seizure of their prop-

erty by mistake. The *Greathouse* case resolves the problem by showing the exception to be applicable.

Appellee therefore requests that a rehearing be granted and that the judgment in this case be affirmed.

Dated, Fresno, California,

April 29, 1957.

Respectfully submitted,

JAMES KUBOTA,

IRVINE P. ATEN,

RICHARD V. ATEN,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL

Richard V. Aten, one of the attorneys for appellee, hereby certifies that in his opinion the foregoing petition is well founded, and that said petition is not interposed for delay.

Dated, Fresno, California,
April 29, 1957.

RICHARD V. ATEN,
*Of Counsel for Appellee
and Petitioner.*



No. 15203

United States
Court of Appeals
for the Ninth Circuit

CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL, District Director of Internal
Revenue,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division.

FILED

OCT -5 1956



No. 15203

United States
Court of Appeals
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CLIFFORD O. BOREN,

Appellant,

vs.

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Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, for the Southern
District of California, Southern Division

Civil No. 1822—SD

CLIFFORD O. BOREN,

Plaintiff,

vs.

R. A. RIDDELL,

Defendant.

COMPLAINT FOR PRELIMINARY INJUNC-
TION AND PERMANENT INJUNCTION

Comes now the plaintiff and for a cause of action
against defendant alleges:

I.

This is an action of a civil nature arising under
an act of Congress providing for Internal Revenue
and this Court has jurisdiction thereof under the
provisions of Section 1340 of Title 28 of the United
States Code.

II.

Plaintiff is a citizen and resident of San Diego
County, California.

III.

At all times subsequent to May 1, 1950, and prior
to November 25, 1952, the defendant, R. A. Riddell,
was the Collector of Internal Revenue for the Sixth
Internal Revenue Collection District of California.
At all times on and after November 25, 1952, said
defendant was, and now is, the Director of Internal
Revenue for the Sixth District of Southern Cali-
fornia. Said defendant is a resident of the County

of Los Angeles in the Southern District of California. [2*]

IV.

This is an action to enjoin defendant R. A. Riddell from collecting or attempting to collect an alleged income tax deficiency, interest and penalties, for the calendar year 1951, which the Commissioner of Internal Revenue assessed against plaintiff on or about July 22, 1955. Said assessment is contrary to the provisions of Section 6212 of the Internal Revenue Code of 1954, and contrary to the provisions of Section 6501(a) of the Internal Revenue Code of 1954.

V.

On March 11, 1955, the Commissioner of Internal Revenue mailed an envelope by registered mail, addressed as follows:

“Mr. Clifford O. Boren,
“4511 Utah Street,
“San Diego, California.”

This envelope contained a notice of proposed assessment of an alleged income tax deficiency, penalties and interest against plaintiff concerning the calendar year 1951. Said letter and notice is commonly known as the “90-day letter”.

VI.

The address 4511 Utah Street was not plaintiff's address on March 11, 1955, the date of mailing. Plaintiff moved from said address on April 1, 1951 to Park Manor Hotel, 525 Spruce Street, San

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Diego, California. On April 11, 1952, plaintiff moved from said address to 6244 Perique Street, San Diego, California. Since April 11, 1952, the plaintiff's residence address has been and still is, 6244 Perique Street, San Diego, California. Since March 9, 1951, the plaintiff's business address has been, and still is, 4965 El Cajon Boulevard, San Diego, California.

VII.

Subsequent to March 11, 1955, and prior to April 14, 1955, the United States Post Office returned said envelope to the Commissioner undelivered.

VIII.

Plaintiff made and filed a Federal income tax return for the calendar year 1951 on or prior to March 15, 1952. The period within which the Commissioner of Internal Revenue could make a redetermination of the income tax liability of plaintiff for the calendar year 1951 expired on March 15, 1955. [3]

IX.

On or about April 14, 1955, by ordinary mail, the Commissioner mailed an envelope addressed as follows:

“Mr. Clifford O. Boren,
“4965 El Cajon Boulevard,
“San Diego 15, California,
“c/o Clifford O. Boren Contracting Company.”

The envelope contained said notice of income tax deficiency, penalties and interest. The envelope was received by plaintiff on or about April 15, 1955.

X.

On or about July 22, 1955, the Commissioner assessed against plaintiff an income tax deficiency of \$6,490.77 and penalties of \$3,245.39 referred to in said notice of proposed deficiency, together with interest of \$1,305.62. The total amount of the assessment was \$11,041.78.

XI.

On March 11, 1955, when the Commissioner mailed said statutory notice, he had actual notice and knowledge of plaintiff's later addresses.

XII.

On or about May 11, 1954, plaintiff executed and filed with defendant a power of attorney, appointing certain persons as plaintiff's representatives, to represent plaintiff before the Treasury Department of the United States Government, in any matter involving plaintiff's federal income taxes. Said power of attorney commences as follows:

“Power of Attorney

“I, the undersigned, Clifford O. Boren, of 4965 El Cajon Boulevard, San Diego, California,”

On September 29, 1954, defendant acknowledged that said power of attorney was on file in defendant's office.

On or prior to March 15, 1954, plaintiff filed with defendant a declaration of estimated tax for the taxable year 1954 in which plaintiff's address was given as 6244 Perique Street, San Diego, California.

On or prior to March 15, 1954, plaintiff filed his income tax return with defendant for the calendar year 1953, in which it was stated that plaintiff's home address was 6244 Perique Street, San Diego, California. [4]

On or prior to March 15, 1953, plaintiff filed with defendant an income tax return for the calendar year 1952 in which he gave his business address, 4965 El Cajon Blvd., San Diego 15, California.

XIII.

During the course of their investigation to determine whether there were any income tax deficiencies concerning plaintiff's individual Federal income tax returns for the years 1950, 1951 and 1952, an agent, servant, employee and representative of the Commissioner of Internal Revenue spent many days during the years 1953 and 1954 examining plaintiff's bookkeeping and accounting records at his office located at 4965 El Cajon Boulevard, San Diego, California. The Commissioner did not mail the statutory notice of the proposed assessment of said income tax deficiency to plaintiff at his business address.

XIV.

On November 22, 1955, defendant, through his agent, servant, employee and representative, W. Howard Ferry, Jr., delivered to plaintiff's attorney a notice and demand in writing that plaintiff pay the amount of the assessments. Plaintiff is informed and believes, and therefore alleges the fact to be that on or about November 22, 1955 a warrant for

distrainment was issued by defendant concerning said assessment.

XV.

Plaintiff is the owner of real and personal property situated within the Sixth Internal Revenue Collection District of California which is subject to distrainment. Defendant R. A. Riddell has threatened, and is threatening, to distrain, seize and sell the property of plaintiff which may be found within said collection district and to apply the same or the proceeds thereof to the payment of the assessments. Unless restrained and prohibited by decree of this Court, defendant R. A. Riddell will levy upon, seize and sell plaintiff's property and will levy upon, seize and sell all other property which plaintiff may hereafter own or acquire within said collection district.

XVI.

Immediate and irreparable injury, loss and damage will result to plaintiff if defendant should levy upon, seize and sell plaintiff's property. [5]

Wherefore, plaintiff prays:

1. That this Court grant a preliminary injunction restraining and enjoining defendant, his agents, servants, employees, deputies and persons in active concert or participation with him, or any of them, from making any seizure, collection or distrainment of any property belonging to plaintiff under the authority of said void assessment during the pendency of this action and until the final determination thereof.

2. That the Court determine the amount, if any, of security to be given by plaintiff, for the payment of such costs and damages as may be incurred or suffered by defendant if it is found that he has been wrongly restrained.

3. After the trial of this action, that the preliminary injunction be made permanent.

4. For costs of suit and such other and further relief as to the Court may be proper in the premises.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,

Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed December 15, 1955. [6]

[Title of District Court and Cause.]

NOTICE OF MOTIONS AND
MOTIONS TO DISMISS

To the Plaintiff, Clifford O. Boren, and to Torrance and Wansley and John A. Brant, His Attorneys:

You, and each of you, will please take notice, defendant will call for hearing his motions to dismiss this action at 2:00 p.m. on Monday, April 16, 1956, or as soon thereafter as counsel can be heard, in the Courtroom of the Hon. Jacob Weinberger, United States District Judge, United States Customs and

Courthouse, 325 West "F" Street, San Diego, California.

Defendant moves the Court, as follows:

(1) To dismiss the action and grant judgment for defendant because the Court lacks jurisdiction over the subject matter of the action, said suit being barred by §7421 of the Internal Revenue Code of 1954.

(2) To dismiss the action and grant judgment for defendant because the complaint fails to state a claim against this defendant upon which relief can be granted. [8]

Said motions are based upon the pleadings, files, the affidavit of Forrest P. Calkins and Exhibit "A" thereto, and upon the Memorandum in Support of Motion to Dismiss attached hereto.

Dated: This 13th day of March, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Assistant U. S. Attorneys,

/s/ EDWARD R. McHALE,

Attorneys for Defendant
R. A. Riddell. [9]

MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS

Preliminary Statement

Defendant moves to dismiss the complaint on the grounds that the notice of deficiency and assessment were timely even though the factual allegations of the complaint be accepted as true in that the notice was not effectively mailed to the plaintiff until April 14, 1955. It is apparent from paragraph X of the Complaint that the penalty is exactly one-half of the tax and could only be the fraud penalty assessable under §293(b) of the IRC of 1939. However, since it is not clearly spelled out in the complaint that the assessment of tax and penalty is a fraud assessment, defendant has filed with this motion an affidavit attaching as Exhibit "A" thereto a true copy of the notice of deficiency mailed which clearly indicates the nature of the deficiency and penalty assessment as being for fraud under §293(b) of the IRC of 1939.

Statement of Facts

Clifford O. Boren made and filed an income tax return for the calendar year 1951 on or prior to March 15, 1952. (Complaint, VIII) On or about April 14, 1955, the Commissioner of Internal Revenue mailed to the plaintiff a notice of proposed income tax deficiency, penalties and interest. Said notice was received by plaintiff on or about April 15, 1955. (Complaint, IX) Said notice of deficiency in tax, penalties and interest for the calendar year

1951 was based on the Commissioner's determining that the deficiency was due to fraud with intent to evade tax under §293(b) of the IRC of 1939 and the proposed penalty was 50% of the proposed amount of the deficiency asserted under said section. (Affidavit of Forrest P. Calkins, Exhibit "A"; Complaint, X) On July 22, 1955, the Commissioner assessed against Clifford O. Boren said proposed deficiency of taxes, penalties, and interest. (Complaint, X) [10]

Question Presented

Whether the Commissioner properly assessed the tax, penalties and interest under §276(a) of the IRC of 1939 more than three years after the return was filed.

Statutes Involved

Internal Revenue Code of 1939.

“§275. Period of limitation upon assessment and collection

Except as provided in section 276 —

(a) General rule. The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.” 53 Stat. 86.

“§276. Same — Exceptions

(a) False return or no return. In the case of a false or fraudulent return with intent to evade tax

or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." 53 Stat. 87.

"§293. Additions to the tax in case of deficiency

(b) Fraud. If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2)." 53 Stat. 88. [11]

"§3653. Prohibition of suits to retrain assessment or collection

(a) Tax. Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 53 Stat. 446.

Internal Revenue Code of 1954.

"§6212. Notice of deficiency

(c) Further deficiency letters restricted.

(1) General rule.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same tax-

able year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).”

“§7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax [12] shall be maintained in any court.”

Argument

It may be stated at the outset that for the purposes of this motion only, defendant concedes that the propriety of the assessment of tax, penalties and interest must rest on the mailing of the notice of proposed deficiency on April 14, 1955, a period of more than three years after the return was filed and the assessment thereafter of the tax based thereon. Therefore, if §275(a) of the IRC of 1939 was applicable, this motion would not lie.*

*In his complaint (para. IV), plaintiff mistakenly refers to §6501(a) of the IRC of 1954 as being applicable, whereas said section does not apply to taxes imposed by the 1939 Code. Int. Rev. Code of 1954, §7851(a)(6). Sec. 275(a) is the corresponding section of the 1939 Code.

However, §275(a) is not applicable. It may be easily inferred from the complaint itself that the proposed deficiency of tax, penalties and interest was for fraud since the penalty of \$3,245.39 is 50% of the amount of the proposed deficiency of tax. It is not necessary for the Court to arrive at this by inference only, as the attached Exhibit "A" is a true copy of the notice of deficiency and clearly states that it is an assessment for fraud under §293(b) of the IRC of 1939.

That being so, the applicable limitations section is §276(a) of IRC of 1939 which states, "In the case of a false or fraudulent return with intent to evade tax * * * the tax may be assessed * * * at any time".**

The assessment being timely within said §276(a), this suit to restrain the collection of the tax is barred by §7421(a) of the IRC of 1954 (formerly §3653(a) of the IRC of 1939). Said section provides, "Except as provided in §6212(a) and (c), and 6213(a) no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court". The plaintiff does not allege and cannot allege any grounds for the circumvention of this sweeping statute. Cases denying such injunctions are legion. Some of the more recent Ninth Circuit cases are *Los Angeles Soap Co., Inc.*

**Substantially the same provision was carried over into the 1954 Code as §6501(c)(1) and (2), but is applicable only to taxes imposed by the 1954 Code. Int. Rev. Cod of 1954, §7851(a)(6). [13]

v. Rogan, 14 F. Supp. 112 (S.D. Cal. 1936) (Yankwich, J.), appeal dismissed, 90 F. 2d 1012 (9th Cir. 1937); Noland v. Martin, 36 A.F.T.R. 1621 (S.D. Cal. 1947) (Weinberger, J.) aff'd sub nom. Noland v. Westover, 172 F. 2d 614 (9th Cir. 1949), cert. denied 337 U.S. 938.

In the few instances when the courts have granted injunctions restraining the assessment or collection of internal revenue taxes, extraordinary and exceptional hardship was a prerequisite to any kind of relief. Mere recitation of such conclusions as "irreparable injury" or "loss and damage" are not sufficient. *Berry v. Westover*, 70 F. Supp. 537 (S.D. Cal. 1947) (Weinberger, J.); *Martin v. Andrews*, — F. Supp. —, (S.D. Cal. 1955) (Hall, J.), 1955 Commerce Clearing House Stan. Fed. Tax Service, Para. 9615; 1955 P-H Fed. Tax Service, Para. 72,876.

Under the circumstances, the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted. If the Court considers it necessary to rely upon the affidavit and exhibit to show that the assessment is for fraud under §293(b) of the IRC of 1939, the affidavit and exhibit may be considered under Fed. R. Civ. P. 12(b) and 56.

Conclusion

The complaint for injunctive relief to restrain the collection of taxes apparently is premised on the theory that the [14] assessment having been made

more than three years after the filing of the return, the collection is barred by §275(a) of the IRC of 1939. Since the assessment and notice thereof was for a filing of a false and fraudulent return with intent to evade tax, the notice of proposed deficiency and assessment could be made at any time and thus the assessment which was made was timely. Such being the circumstances, this action cannot lie to restrain the collection of the taxes, fraud penalties and interest. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF FORREST P. CALKINS

United States of America,
Southern District of California—ss.

Forrest P. Calkins, being first duly sworn deposes and says:

(1) That he is a Technical Advisor, San Francisco Region, Internal Revenue Service, assigned by the Commissioner of Internal Revenue to assist the United States Attorney in the investigation and defense of the above-entitled action.

(2) That as such he had custody of the administrative file of the Internal Revenue Service dealing with the tax liability of the plaintiff for the calendar year 1951.

(3) That Exhibit "A" to this affidavit is a true copy of the administrative file copy of the "90-day

letter'', the notification of proposed deficiency of income taxes and penalties for the calendar year 1951, the duplicate original of which was mailed by the defendant to the plaintiff on March 11, 1955, and again on or about April 14, 1955, as alleged in paragraphs V and IX of the Complaint herein. [16]

Further affiant sayeth not.

/s/ FORREST P. CALKINS.

Subscribed and sworn to before me this 13th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk United States District Court, Southern Dis-
trict of California,

By /s/ WAYNE E. PAYNE,
Deputy. [17]

EXHIBIT A

Form 1230

U. S. Treasury Department
Internal Revenue Service
District Director
Chief, Audit Division
P. O. Box 231 — Main Office
Los Angeles 53, California

June 29, 1955.

Mr. Clifford O. Boren,
4511 Utah Street,
San Diego, California.

Dear Mr. Boren:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1951 discloses a deficiency of \$6,490.77 and \$3,245.39 in penalty as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the

90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Chief, Audit Division, P. O. Box 231, Main Office, Los Angeles 53, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By /s/ R. A. RIDDELL,
District Director of Internal
Revenue.

Enclosures:

Statement
Form 1276
Agreement Form

PAK/hmg [18]

Statement

A:R:90D:PAK

Mr. Clifford O. Boren
4511 Utah Street
San Diego, California

Tax Liability for the Taxable Year Ended
December 31, 1951

Year	Deficiency	50% Penalty
1951 Income Tax.....	\$ 6,490.77	\$ 3,245.39

This determination of your income tax liability has been made on the basis of information on file in this office.

The 50% penalty shown herein has been asserted in accordance with the provisions of Section 293(b) of the Internal Revenue Code of 1939.

Adjustment to Net Income
Taxable Year Ended December 31, 1951

Net income as disclosed by return.....	\$179,851.78
Additional income:	
(a) Unreported business income..	7,211.96
Net income adjusted.....	<u>\$187,063.74</u>

Explanation of Adjustment

(a) It is determined that you realized taxable income during this taxable year from your business in the amount of \$10,070.90 which was not included in the income reported in your return and that the deductions claimed for salaries and wages was overstated in the amount of \$4,353.03. Your community one-half of the amount of these items, or \$7,211.96, is added to the income reported in your return.

Computation of Tax
Taxable Year Ended December 31, 1951

Net income adjusted.....	\$187,063.74
Less: Exemptions	1,800.00
<hr/>	
Balance, subject to surtax and normal tax.....	\$185,263.74
Total surtax	\$138,475.46
Total normal tax at 3%.....	5,557.91
<hr/>	
Total normal tax and surtax.....	\$144,033.37
Correct income tax liability.....	\$144,033.37
Income tax liability shown on return, Account No. 271005740.....	137,542.60
<hr/>	
Deficiency of income tax.....	\$ 6,490.77
50% penalty	\$ 3,245.39

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 13, 1956.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO
MOTION TO DISMISS

I.

Jurisdiction

This Court has jurisdiction of this action under
Section 1340 of Title 28 of the United States Code.

Slaven vs. U. S., et al.
(U.S.D.C. S.D. Calif. (Central) No. 14,
132-WB) October 21, 1952.

II.

Injunction

On a finding that the statutory notice of proposed assessment of income tax deficiencies, interest and fraud penalties was not mailed to taxpayer at his last known address as required by Section 6212 (b)(1) of the Internal Revenue Code of 1954, a preliminary injunction against distraint of property of the taxpayer should be granted pending a trial on the merits.

Slaven vs. U. S., et al.

(U.S.D.C. S.D. Calif. (Central) No. 14,
132-WB)

And after trial thereon, a permanent injunction should be granted.

Slaven vs. U. S., et al.

(U.S.D.C. S.D. Calif. (Central) No. 14,
132-WB) June 2, 1953.

Respectfully submitted,

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,

Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed April 12, 1956. [22]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 17, 1956

Present: Hon. James M. Carter,
District Judge.

Counsel for Plaintiff: John A. Brant.

Counsel for Defendant: Bruce I. Hochman.

Proceedings:

Hearing on Defendants' Motions to (1) dismiss & (2) for change of venue.

On motion of U. S. Attorney, it is ordered that motion for change of venue be waived.

Att'y Brant, for plaintiff, and Ass't. U.S. Att'y Hochman both make statements.

Court orders that that plaintiff and defendant file briefs re question of notification by registered mail requirement of the Act, said briefs to be filed by plaintiff on or before April 24, 1956, and reply brief of defendant by April 30, 1956.

Defendant to file a motion for summary judgment.

It Is Ordered that hearing on these matters be continued to 2:00 p.m., April 30, 1956.

JOHN A. CHILDRESS,
Clerk;

By L. CUNLIFFE,
Deputy Clerk. [24]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 30, 1956

Present: Hon. James M. Carter,
District Judge.

Counsel for Plaintiff: Torrance & Wansley, John A. Brant.

Counsel for Defendant: Bruce I. Hochman, Assistant U. S. Attorney.

Proceedings:

Hearing Motion of Government to Dismiss and Motion for Change of Venue.

Attorney Hochman withdraws motion of Government for change of venue. Counsel argue motion of Government to dismiss.

It Is Ordered that motion of Government to dismiss be deemed as a motion for summary judgment and said motion is granted. Government to draw findings of fact, conclusions of law and formal judgment within 10 days. Attorney Brant moves for injunction pending appeal under Rule 62c. Court directs counsel to make formal motion after formal judgment is entered. Attorney Hochman states Government will not proceed until judgment entered or said motion for injunction is made.

JOHN A. CHILDRESS,
Clerk;

By E. M. ENSTROM, JR.,
Deputy Clerk. [25]

[Title of District Court and Cause.]

DEFENDANT'S REPLY MEMORANDUM

Preliminary Statement

Originally the question presented was delimited to whether or not the assessment of the Commissioner was proper being more than three years after the return was filed. The propriety of this action was defended in the defendant's memorandum in support of motions to dismiss; it appears that no controversy persists as to that point.

Statement of the Facts

Both parties agree as to the facts of the basic question remaining.

On March 11, 1955, the Commissioner sent a Notice of Deficiency (90-day letter) to the plaintiff by registered mail. This was returned. On April 14, 1955, the Commissioner remailed a Notice of Deficiency to the plaintiff by ordinary mail. Admittedly it was received by the plaintiff on April 15, 1955. [26]

Statement of the Issue

Is the Government correct in its contention that injunctive relief does not lie for the plaintiff: i.e., that the assessment was proper or in the alternative the plaintiff did not exhaust his administrative remedies for the determination of its propriety?

Argument

Quite a few courts have considered matters on the periphery of the problem of the case at bar, but the latest appellate decision and the only one which squarely considers the statutory requirement of notice to the taxpayer is *Dolezilek v. Commissioner*, 212 F 2d 458, (D.C. Cir. 1954).

In that case, the Court of Appeals was reviewing an order of the Tax Court dismissing a petition on the grounds of lack of jurisdiction because of the alleged expiration of the statutory 90-day limitation.

On March 11, 1952, the Commissioner mailed to the taxpayer by registered letter a statutory notice of deficiency. It was refused and, therefore, not received. On April 25, 1952, a deputy collector served the notice of deficiency personally on the taxpayer. The petition to the Tax Court was filed more than 90 days after the letter was mailed though less than 90 days after the manual delivery of the notice. The court held at page 459: "We hold, therefore, that where a taxpayer receives actual notice of deficiency during the 90-day period, and has adequate time remaining within that period for preparing and filing his petition, he is not entitled to compute the period from a date other than of mailing."

The dissent casts even further light on this problem of notice. The Judge disagreed with his brethren in that he felt that the taxpayer should have 90 days after the actual delivery within which to file a petition to the Tax Court. However, he pointed out

that the statute does not forbid manual delivery and the use of registered mail is not made exclusive. The purpose of the notice [27] basically is that the taxpayer receives notice—there is no magic in the words “registered mail.”

It appears that this case, more than any other, reveals a proper interpretation of the statute and an understanding of the terms “notice” and “registered mail.” At page 462 of the Dolezilek opinion, the dissenting Judge quotes from *Commissioner v. Steward*, 186 F. 2d 239 at page 241 and states: “If the taxpayer receives notice of the proposed assessment and during the 90-day period thereafter files a petition for review with the Tax Court, the purposes of the act have been accomplished.”

The cases cited by the plaintiff are distinguishable:

(1) *Welch v. Schweitzer*, 106 F. 2d 885 (9th Cir. 1939). The extension of time obtained by the Bureau of Internal Revenue was predicated upon a condition precedent, i.e., that the taxpayer be notified by registered mail if there be any notice of deficiency. It was mandatory. It was not merely that the Commissioner was authorized to use registered mail. By contract the parties went beyond the statute. This is borne out by the findings of fact and conclusions of law of the District Court reported in *Schweitzer v. Welch*, 24 AFTR 1110 (case was not reported in Fed. Supp.).

(2) *Ventura Consolidated Oil Fields v. Rogan*, 86 F. 2d 149 (9th Cir. 1936). In this case, the assess-

ment was made within the 60-day period and for that reason was faulty. In the case at bar, no such assessment within the statutory time for petitioning to the Tax Court was accomplished.

(3) *Van Antwerp v. United States*, 92 F. 2d 871 (9th Cir. 1937). This case has no issue germane remaining to the case at bar.

(4) *Maxwell v. Campbell*, 205 F. 2d 461 (5th Cir. 1953). In this case, no notice of deficiency was ever received by the taxpayer.

Part of the difficulty in interpreting the meaning of §272 (a) (1) of the Internal Revenue Code of 1939 is that many of the [28] cases involve issues outside of its purview. The language indicates that the Commissioner “is authorized to send notices of such deficiencies to the taxpayer by registered mail.” Note that the word “authorized” is a permissive word at most. By this we mean that if the Commissioner employs this method of sending notices he is certain to be correct; it does not mean that he must serve a notice of deficiency by registered mail.

The Ninth Circuit cases do not assist the Court in determining the rights of the plaintiff under this case. Rather, the *Dolezilek* case is the one which is squarely in point. Congressional intent is vindicated. Notice to the taxpayer was the prime concern of Congress; the manner is not mandatory.

Counsel for plaintiff has concluded that the Government’s argument about exhaustion of adminis-

trative remedies is "specious." Nothing could be farther from the truth. The doctrine of administrative remedies has been enunciated in many cases. Among these are *United States v. Edward Valves, Inc.*, 207 F. 2d 329 (7th Cir.) Cert. denied, 22 L. W. 3250, April 5, 1954; *McCauley v. Waterman Steamship Corp.*, 327 U.S. 540.

Applied to the case at bar, it means simply this: The plaintiff must petition the Tax Court and have that Court determine whether or not it has jurisdiction. If the Tax Court decides it has no jurisdiction because the plaintiff did not petition it in time, then, of course, the taxpayer would be penalized for his procrastination. If ever the Tax Court were to decide that it has no jurisdiction because the notice of deficiency was defective and, therefore, the assessment was defective, then the Government could appeal it or issue a new assessment. If it endeavored then to distrain on the assessment which would be defective, this injunction suit could be pressed. Otherwise, this Court would be usurping the function of the Tax Court. [29]

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE.

Assistant United States Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Assistant United States
Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 30, 1956. [30]

United States District Court, for the Southern
District of California, Southern Division

No. 1822—SD-C Civil

CLIFFORD O. BOREN,

Plaintiff,

vs.

R. A. RIDDELL,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled action came on regularly for hearings on April 17, 1956 and April 30, 1956 on defendant's Motion to Dismiss, before the Honorable James M. Carter, United States District Judge, presiding, sitting without a jury; the plaintiff, appearing by his attorneys, Torrance & Wansley by John

A. Grant, Esq., and the defendant, R. A. Riddell, District Director of Internal Revenue, Los Angeles District, appearing by his attorneys, Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, Robert H. Wyshak and Bruce I. Hochman, Assistant United States Attorneys for said District, and the cause having been submitted upon the pleadings, affidavits, memoranda of law and oral arguments with the Court treating the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedures 12(b), being duly advised, having made an order for findings of fact, conclusions of law and judgment, now makes its Findings of Fact, Conclusions of Law and Judgment as follows: [32]

Findings of Fact

I.

Plaintiff made and filed a federal income tax return for the calendar year 1951 on or prior to March 15, 1952.

II.

On March 11, 1955, the Commissioner sent a Notice of Deficiency (90-day letter) to the plaintiff by registered mail. Said notice recited that the plaintiff had a deficiency for the calendar year 1951 of \$6,490.77 income tax and \$3,245.39 in penalty. The penalty of \$3,245.39 is 50 per cent of the deficiency and is fraud penalty asserted in accordance

with the provisions of §293(b) of the Internal Revenue Code of 1939.

III.

The Notice of Deficiency was returned by the Post Office Department because the plaintiff had moved. At the time of the March 11, 1955 mailing to the old address, the Commissioner had actual notice and knowledge of plaintiff's new address.

IV.

On April 14, 1955, the Commissioner remailed the Notice of Deficiency to the plaintiff's correct address by ordinary mail. The plaintiff admits receiving this notice on April 15, 1955.

V.

On July 22, 1955, the Commissioner of Internal Revenue assessed against plaintiff an income tax deficiency of \$6,490.77 and penalties of \$3,245.39 referred to in said Notice of Deficiency, together with interest of \$1,305.62. The total amount of the assessment was \$11,041.78.

VI.

On November 22, 1955, defendant through his agent, servant, employee and representative, W. Howard Ferry, Jr., delivered to plaintiff's attorney a notice and demand in writing that plaintiff pay the amount of the assessment. On November 22, 1955, a warrant for distraint was issued by defendant concerning said assessment. [33]

VII.

Plaintiff is the owner of real and personal property situated within the Sixth Internal Revenue Collection District of California which is subject to distraint. Defendant R. A. Riddell has threatened, and is threatening, to distraint, seize and sell the property of plaintiff which may be found within said collection district and to apply the same or the proceeds thereof to the payment of the assessments. Unless restrained and prohibited by decree of this Court, defendant R. A. Riddell will levy upon, seize and sell plaintiff's property and will levy upon, seize and sell all other property which plaintiff may hereafter own or acquire within said said collection district.

VIII.

The plaintiff did not file a petition for redetermination of the deficiency with the Tax Court of the United States within 90 days of the mailing of April 14, 1955, and to the date of this action **has** never filed such a petition with the Tax Court. The plaintiff still has an opportunity to contest the deficiency assessment, penalties and interest on the merits by paying said taxes and administratively filing a claim for refund before pursuing his legal remedies in the federal district court or the Court of Claims.

Conclusions of Law

I.

The Notice of Deficiency mailed by registered mail to the plaintiff on March 11, 1955 and returned

to the Commissioner's delegates because it was incorrectly addressed was of no legal efficacy as a notice under § 272(a)(1) of the Internal Revenue Code of 1939.

II.

The Notice of Deficiency mailed by ordinary mail to the plaintiff on April 14, 1955, and admittedly received by him on April 15, 1955, is a proper notice and was timely given for the reason that a fraud penalty under § 293(b) of the Internal Revenue Code of 1939 was alleged. Said fraud penalty and the deficiency assessment upon which it is predicated is not barred by a three year statute of limitations.

III.

The Notice of Deficiency having been timely [34] and properly given to plaintiff and plaintiff having failed to petition the Tax Court of the United States for a redetermination of said deficiency within 90 days of said mailing of notice on April 14, 1955, the assessment of taxes of \$6,490.77, penalties of \$3,245.39, and interest of \$1,305.62, for a total of \$11,041.78 by the Commissioner of Internal Revenue on July 22, 1955, was lawful and proper and the enforcement or collection of said assessment cannot be enjoined.

IV.

The plaintiff has failed to exhaust his administrative remedies in that no petition for a redetermination of the deficiency together with the penal-

ties and interest involved was filed with the Tax Court of the United States within 90 days of the mailing of April 14, 1955.

V.

The plaintiff still has an opportunity for contesting the deficiency assessment, penalties and interest on the merits by paying same and administratively filing a claim for refund before pursuing his legal remedies in the federal district court or the Court of Claims.

VI.

Defendant is entitled to judgment that the complaint be dismissed with prejudice, that the injunction be denied, and that the defendant have his costs.

Judgment

This matter having come before the Court on motion of defendant to dismiss, which has been treated by the Court as a motion for summary judgment under Federal Rule of Civil Procedures 12(b), and based on the pleadings, affidavits, memoranda of law and oral arguments, and the Court having duly considered the same, it now makes its judgment as follows:

It Is Hereby Ordered, Adjudged and Decreed that the defendant is entitled to judgment, that the complaint be dismissed with prejudice, that the prayer for injunction be denied and with costs of defendant in the sum of \$20.00 to be taxed by the Clerk of the Court.

Dated: This 8th day of May, 1956.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged May 7, 1956.

[Endorsed]: Filed May 8, 1956.

Docketed and entered May 10, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clifford O. Boren, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from a final judgment entered in this action on May 10, 1956.

Dated: June 1, 1956.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,

Attorneys for Plaintiff.

[Endorsed]: Filed June 7, 1956. [36]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR INJUNCTION PENDING APPEAL

To Defendant R. A. Riddell, and to Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney; Robert H. Wyshak, Bruce I. Hochman, Assistant United States Attorneys; his Attorneys:

Please Take Notice that on Monday, the 18th day of June, 1956, at 10:00 o'clock a.m., or as soon

thereafter as counsel can be heard, plaintiff will move the above-entitled Court in the courtroom of Honorable James M. Carter, United States District Judge, United States Customs and Courthouse, 325 West "F" Street, San Diego, California, for an order restraining and enjoining defendant, his agents, servants, employees, deputies and persons in active concert or participation with him, or any of them, from making any seizure, collection or distraint of any property belonging to plaintiff under the authority of the assessment referred to in the complaint on file herein, during the pendency of plaintiff's appeal, and fixing the amount of bond, if any, for the security of the rights of defendant.

Said motion will be based upon this Notice of Motion, the pleadings, files and records in this action.

Dated: June 4, 1956.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,

Attorneys for Plaintiff.

Points and Authorities:

Rule 62(c) Federal Rules of Civil Procedure.

[Endorsed]: Filed June 7, 1956. [37]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 18, 1956

Present: Hon. James M. Carter,
District Judge.

Counsel for Plaintiff: John A. Brant.

Counsel for Defendant: Howard R. Harris.

Proceedings:

Hearing on plaintiff's Motion for Injunction pending appeal.

It Is Ordered that plaintiff's attorney file reporter's transcript.

It Is Further Ordered that bond for plaintiff pending appeal be set in the amount of \$12,000.00 (Twelve Thousand Dollars).

JOHN A. CHILDRESS,
Clerk.

In the United States District Court Southern
District of California, Southern Division

Civil No. 1822-SD-C

CLIFFORD O. BOREN,

Plaintiff,

vs.

R. A. RIDDELL,

Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

TORRANCE & WANSLEY, by
JOHN A. BRANT;

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney, by
BRUCE I. HOCHMAN.

Tuesday, April 17, 1956; 2:00 P.M.

The Court: Call the civil matter.

The Clerk: Item No. 15 on the calendar, 1822 SD-C, Clifford O. Boren versus R. A. Riddell. One, hearing motion to dismiss; two, motion for change of venue. John A. Brant for the plaintiff and Bruce I. Hochman for the government.

Mr. Brant: Ready for the plaintiff.

Mr. Hochman: Ready for the government.

The Court: I understand that the government waives its motion for change of venue.

Mr. Hochman: That's right, your Honor.

The Court: Mr. Brant, the memorandum of points and authorities that you filed consisted of referring to a case filed in the Los Angeles area which is unreported and not available for me here. Is that the only law you could find to support your position?

Mr. Brant: No, your Honor. That case contains—I was unable to find any official citation for it. Is it located in the unofficial reports. It does not—is not officially reported. It is a case very similar to the case now before the court and I felt the closest case in point, to consider specifically the important issue of whether or not irreparable damage would be incurred by the taxpayer in this case if an injunctive relief is not available.

The Court: Was there an opinion written by the Judge?

Mr. Brant: Yes, your Honor.

The Court: Must have been a memorandum, never published.

Mr. Brant: Published unofficially but I could not find any official citation but only an unpublished citation. The first one was concerned with a preliminary injunction and the second one sometime later granted a permanent injunction on a summary judgment. I have the unofficial report of the case in my office which I will be happy to make available.

The Court: Well, if what you say about the case is true there is apparently no notice—no correct notice was ever mailed to the taxpayer in that case.

Mr. Brant: That is the essence of my position, your Honor, that on April 14, 1955, a notice was mailed to the taxpayer but by unregistered mail and as a result there is no effective notice at this time.

The Court: Now wait. You admit that he got the notice.

Mr. Brant: I admit that he received a notice mailed by ordinary mail and on first impression the objection which I am now making seems to be of no great importance. However, the United States Tax Court has repeatedly and consistently held that where a notice is given by ordinary mail or in any other manner other than registered mail the tax court has no jurisdiction even in circumstances where as here originally the Commissioner mailed it by registered mail. And when it [3*] didn't arrive because it was improperly addressed he re-mailed it by ordinary mail. The tax court holds that is insufficient to give them jurisdiction.

The Court: That is in cases where there is a contention the mail was never received.

Mr. Brant: No, your Honor—

The Court: Even in cases where there is an admission that the mail was received?

Mr. Brant: Yes, sir. I have Oscar Block, 2 T.C. 761; and in that case the Commissioner himself after the taxpayer had finally received the notice

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

and came into court—this is independant of the statute of limitations point brought up by the government—where the taxpayer came into the tax court on a petition for redetermination the Commissioner himself contended that the tax court was without jurisdiction and the tax court so held. I have a rather extensive quotation from this case which shows the Court considered these very points, your Honor. I would like to hand the quotation to your Honor.

The Court: What did they base it on? Some statute? Certainly no logic in it. In other words, if a law said that I had to give you notice by registered mail and I went around and handed it to you and you conceded to the court that you received the notice, it would be silly to say that some procedure said it had to be sent by registered mail.

Mr. Brant: I agree, your Honor. But the Code says [4] registered mail is necessary. The tax court has limited jurisdiction and requires strict and absolute adherence to the rule.

The Court: Now, the Code says as far as the tax court is concerned registered mail is required?

Mr. Brant: The Code authorizes the Commissioner to send a notice of deficiency to a taxpayer by registered mail. He has no authority other than that and the cases have so held.

The Court: What section is that?

Mr. Brant: I can give that to your Honor. Just one moment. Section 272(a) of the Internal Revenue Code of 1939, in which it states:

“If in the case of any taxpayer, the Commissioner determines that there is a deficiency

in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.”

and the tax court has repeatedly held, your Honor, as indicated in the memorandum which I have handed up to the Court, that this is a jurisdictional requirement.

The Court: That section again in the 1939 Code?

Mr. Brant: That is the '39 Code. The similar provision in the 1954 Code, your Honor, is Section 6213.

The Court: 1939 Code. And what's the section number?

Mr. Brant: 272(a) parenthesis one. Small a, parenthesis [5] one.

The Court: Carried over verbatim in the '54 Code?

Mr. Brant: As I recall, your Honor, it was except this particular section was broken down into more than one heading.

The Court: You said 6213. It is 6212 in the '54 Code, is it not?

Mr. Brant: My notes——

The Court: Referring to “the Secretary or his delegate determines that there is a deficiency in respect of any tax” and so forth “is authorized to send notice of such deficiency to the taxpayer by registered mail.”

Mr. Brant: That is correct, your Honor.

The Court: 6212, subdivision a.

Mr. Brant: My notation here referred to the injunctive relief aspect of that original section, your Honor. My apologies.

The Court: Well, of course, this tax court decision you have referred me to, Oscar Block, 2 Tax Court 761, was a question of the running of the ninety-day period after the mailing.

Mr. Brant: Your Honor, here we have—pardon me.

The Court: Here you have a situation where if this is a fraud penalty there is no statutory period.

Mr. Brant: Your Honor, it is not that statutory period. The fraud penalty refers to the statute of limitations for [6] any assessment. The statutory period here involved is the ninety-day statute. The one involved in the Oscar Block case is the ninety days permitted to the taxpayer to petition the tax court for redetermination. That is a condition precedent to a valid assessment by the Collector of Internal Revenue and the discussion with reference to the ninety-day letter in the Block case is the identical situation which we have here.

The letter apparently was mailed by registered mail in March of 1955 and then later in April by ordinary mail.

The Court: You are familiar with this and you are skipping things that you may be familiar with that I do not see. If I can guess what your position is—since you are not telling me—is your position that you would have petitioned the tax court for a redetermination had you received a registered letter?

Mr. Brant: Our position, your Honor, is that the tax court—in view of the manner we received this notice by ordinary mail these decisions of the tax court hold that the tax court has no jurisdiction to hear and determine the petition. Now, our position is essentially this: That if the government is right in their assertion of fraud, they can at any time issue a proper notice of deficiency and this, as a matter of fact, has been suggested to the government. They can right here today, tomorrow or any time issue a new ninety-day letter to the taxpayers and send it to them—to the taxpayer [7] and send it to him by registered mail and then we would be able to petition to the tax court for a redetermination. But under the notice which he did receive the cases specifically state, as in the Oscar Block case, that the tax court does not have jurisdiction and in most of these cases the commissioner himself has asserted the lack of jurisdiction—in some of them the tax court itself also has determined on its own motion that it had no jurisdiction.

The Court: Your point is that you want to petition the tax court?

Mr. Brant: That is correct.

The Court: And you have not done so?

Mr. Brant: And we have not done so.

The Court: Is there anything in the file? You allege that in the complaint?

Mr. Brant: We show in the complaint the insufficiency of this notice of proposed deficiency.

We have shown in the complaint that the necessary elements for a proper notice of deficiency do not exist. We also show in the complaint that the Collector of Internal Revenue is now seeking to levy upon real and personal property in this area belonging to the taxpayer and we allege irreparable damage from that.

The Court: Do you allege anywhere that you want to avail yourself of a remedy for petitioning the tax court?

Mr. Brant: No, your Honor.

The Court: You don't have—you have an ultimate remedy. [8] You can go either route in these matters. Pay your money under protest and sue in our District Court or go the tax court route and not pay the money. Do you allege in the complaint that you are not interested in going the tax court route?

Mr. Brant: We have not made that allegation. No; here is the point, your Honor. If the notice of deficiency has not complied with the statutory limitation the notice of deficiency is void, void just as if no notice of deficiency had been issued. It is clear from the tax court cases that that is the necessary result of the notice of deficiency. Since it was not sent by registered mail the notice is invalid. And I have got other tax court decisions I could give you if you care to examine them. The notice is absolutely invalid and we're placed in this position, your Honor, that we are prejudiced in this point. We have no speedy and adequate remedy except now to permit the Collector to collect the tax from

the property or pay him and file a claim for refund and wait the requisite period. We have been deprived of—essentially by this faulty notice, we have been deprived of a redetermination by the tax court of the United States.

The Court: You tell me that but you don't say that in the complaint.

Mr. Brant: No, sir. We have not alleged that.

The Court: One thing to tell me what you have been deprived of. It is another thing to set forth in a complaint [9] some cause of action based upon that matter. In other words, you may have a point here but it is very obviously an after thought. It was not briefed in your memorandum. It is not set forth in your complaint. And now as an after-thought you raise this point.

Mr. Brant: May I make a short statement on that, your Honor?

The Court: Yes.

Mr. Brant: I was under the impression that we were going to hear the motion for change of venue until just the tail end of last week when I wrote your Honor a letter. Of course, we have no defense to a motion for change of venue if the government had wished to pursue the matter. I assumed myself we would not get to the hearing of this motion until the matter was transferred back to the Central Division and the matter reheard.

I would be happy, if the Court would permit me to do so, to file a memorandum on this entire question.

The Court: Well, maybe that's the thing to do—

let's look your complaint over here. You actually allege in the complaint that you received the notice.

Mr. Brant: That is correct but by ordinary mail.

The Court: Yes. No dispute about that. You received the notice on April 15th and alleges over ninety days on July 22nd the Commissioner made the assessment. [10]

Mr. Brant: That's correct, and that assessment was an ex parte act on his part.

The Court: That is right. It is now your contention that you cannot contest that assessment in the tax court.

Mr. Brant: It is my contention also and now at the time we received the notice and at any time thereafter we could not effectively petition the tax court because the tax court has held under these circumstances it has no jurisdiction.

The Court: Must the proceedings of the tax court be started before the Commissioner makes an assessment?

Mr. Brant: After one, an effective valid notice of deficiency has been mailed to the taxpayer by registered mail and two, before the expiration of ninety days, your Honor, but the registered mail requirement is a jurisdictional, requirement according to the cases.

The Court: According to the tax court?

Mr. Brant: Also, and it is a condition precedent to a valid assessment, your Honor, unless the Commissioner makes a so-called jeopardy assessment which I understand has not been made in this case.

I don't believe the government will contend a jeopardy assessment was made here. And also Section 272 of the 1939 Act specifically gives this court jurisdiction to enjoin collection or distraint where a valid notice of deficiency has not been mailed to the taxpayer. So it seems clear that a proper notice is a matter of the greatest importance [11] otherwise the taxpayer has no remedy before the tax court.

The Court: Isn't a remedy available to you to get into the tax court?

Mr. Brant: Jeopardy assessments are an entirely different matter. That is not here involved. But in the normal course of events on a matter of this type once the assessment has been made that is the final act and the only approach the taxpayer has is to come into the District Court under this Code section seeking an injunction, as we have done, or pay the tax and file a claim for refund with the commissioner and wait a six-months' period and either file a suit for a refund in this court or in the United States Court of Claims. Those are the remedies which are available. But as we now stand the Collector is about to levy—he has already levied upon and he is about to sell the assets of the taxpayer to collect the tax. The notice of deficiency itself, your Honor, clearly shows that its primary purpose is to inform the taxpayer of his right to petition for a redetermination and, of course, without complying with the statute that was of no avail whatsoever.

The Court: You are not urging the point about

the three-year statute of limitations? You are content with the government's showing on that?

Mr. Brant: I am not content with the government's [12] showing. I have doubt as to whether or not your Honor is going to take into consideration the affidavit which was filed.

Now, I'm somewhat confused about that. As I understand the rules it becomes a motion for summary judgment if that occurs.

The Court: That is my understanding of the rules.

Mr. Brant: And that we should then have the opportunity as should the government to make a real motion for summary judgment out of it.

The Court: That is my understanding of the rules. If you rely upon something *dehors* the record, then actually it is a motion for summary judgment. Now, what a motion is called doesn't make any difference. The only point there would be if you thought you had any ground to resist the motion and wanted to make any showing contrary to what the government has made, why I would give you time to do it. However, there doesn't seem to be much dispute about that part of the motion. However, it does not answer the point you raise now.

Mr. Brant: There is only one dispute I would raise to that. The provisions of 1112 of the '39 Code or Section 7454 of the '54 Code provide as follows:

“In any proceeding involving the issue whether the petitioner has been guilty of fraud——”

I believe that should be taxpayer—— [13]

“with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.”

That was the original language of it and now the language provides the burden shall be upon the Secretary or his delegate and it would be my position that in a motion for summary judgment the government would bear the burden to show on a summary judgment there was fraud in order to overcome the statute of limitations.

The Court: We are not trying the case. That section talks about the burden of proof on the trial. The only thing that would be involved on a motion for summary judgment is what kind of a notice was sent you. Now, if it was a notice in which the government was relying upon fraud at the trial thereof the burden of proof might well be on the government. As far as the notice that was sent, you do not dispute this was the notice that was sent?

Mr. Brant: No, your Honor. But I do make this one point. Assuming that the notice is not defective from the standpoint of mailing, the notice is valid only if fraud exists, in other words, only if the statute of limitations is suspended because of the fraud. Now, it has been held in numerous cases—and I don't think there is any dispute whatsoever on this—where the government is relying on fraud to overcome the statute of limitations they likewise, to overcome that, must bear the burden of [14] proof.

The Court: You mean we would have to have a trial now and find out whether the government had some fraud to prove?

Mr. Brant: To overcome the statute of limitations. Frankly, it would appear that way. It seems to reach that conclusion. I don't know.

The Court: It does not cut off your trial on the merits of the case if you lose this injunction proceeding. You still have a chance to have your day in court on your tax problem. Let's forget your other point for a minute. For argument assume you waived the right to go the tax court route. You still have the right to pay your taxes under protest, sue for them and have your day in court on taxes. And in that trial the issue of the burden of proof for the government could well come up. All the decision here does is cut you off on the right of an injunction.

Mr. Brant: That is correct.

The Court: Do you think the government, in order to defeat your injunction action, must come in and put on a case and prove your fraud?

Mr. Brant: To me it doesn't follow they should be required to do so; when you examine the cases on the statute of limitations it appears that might be the conclusion. I am not asserting that point.

The Court: I am going to treat the motion of dismissal, in view of the affidavit in support, as a motion for summary [15] judgment. If either side wants to proceed with it, I want the government to comply with the rules concerning motions for summary judgment, set forth a proposed set of findings

of fact and conclusions of law and a proposed judgment showing the uncontroverted facts and the defendant to comply with that rule, must make a showing to the Court as to what facts he contests that have been made by the government's showing and what points, what facts there are in issue that will require trial. And I will give you each time on that to pursue that matter further. That however, involves largely the question of the three-year statute of limitations.

Mr. Brant: Yes, sir.

The Court: Now, on this other point, that is, the new point—that is a different point—you want to be heard on it, Mr. Hochman?

Mr. Hochman: Several things occur to me, your Honor. First of all, granting everything Mr. Brant has said, I don't think this Court is bound by it. You still have the administrative processes to follow and exhaust and I don't think it would be incumbent upon this Court to constitute itself a tax court and consider the matter as if it were a tax court. This citation of 2 T.C.—whatever it be—761, Oscar Block, was quite sometime ago. There is no Circuit authority. I think this is true in this case. I'm perhaps speculating but it looks this way to me in any event. The taxpayer let his [16] time go by and then woke up with this realization. In the tax court it is just a matter of trial strategy, it being incumbent upon the government, because the statute of limitations has expired to carry the burden not only for the fraud penalty but also to the extent of the assessment itself because the assessment

would rise or fall with the proof of the fraud. Not so in a District Court suit for refund. There the plaintiff taxpayer would have the burden of proof and I will confess it is a much harder lawsuit. But it is something which I believe that the taxpayer——

The Court: Wins most of them.

Mr. Hochman: For one thing they win but it is a harder lawsuit to try.

The Court: They win more. They have won most of them they have tried before juries in my court, when they go to the District Court about it.

Mr. Hochman: Perhaps so and perhaps——

The Court: That is not the point.

Mr. Hochman: I think Mr. Brant's bombs——
Mr. Brant is spinning forth an ingenious thought.

The Court: It was an ingenious thought. It is something that came after he read your brief, it is pretty obvious to me. The thought is that since a sections says this assessment must be made by registered mail, 6212, that therefore since it was not made by registered mail, in view of what he claims, [17] there is no way to get into the tax court. Therefore, he has never had a right to avail himself of one of the remedies that should be available to him and he has never had that right because of the government's fault. Now there may be holes in that argument. Maybe this is not the law of the tax court. Maybe it is not the law of the Circuit. Certainly there is a serious question as to whether the complaint states a cause of action for relief

upon that ground. I am trying to go through the complaint to see if that ground is stated. Paragraph IV says in part:

“* * * Said assessment is contrary to the provisions of Section 6212 * * *”

It does not say how. But let's skip that for a minute. And then it says “6501(a)” which of course is a statute of limitations problem. Then he alleges this mismailing that went on. He alleges nowhere that he desired to proceed in the tax court. Alleges nowhere that he has lost his right to proceed in the tax court and finally he states in Paragraph XVI, one line sentence, about irreparable injury, loss and damage, which I suppose should be read with Section XV. But nothing said about why he cannot pursue his remedy of paying the taxes and then suing to recover them. You have a point here which has not been briefed. Counsel has handed me a Block case abstract. You have not had a chance to look at it.

Mr. Hochman: Assuming though that this is true, assuming [18] though that this law of the Block case is law and there will be assumed there are no other cases on the subject, we have this interesting point of the exhaustion of the administrative remedies, he still must give the tax court a chance to say “we don't have jurisdiction.” Now, interestingly enough, the Commissioner is in this position: The Commissioner cannot make this assessment while the taxpayer within those ninety days after the Commissioner's own notice has peti-

tioned the tax court in Washington, D. C. In that period of time the Commissioner cannot make an assessment. At the time the tax court then kicks out the taxpayer. At that time if the Commissioner makes an assessment, he can stop them and say you never gave me the right notice. I think that is the determination of the tax court because the Commissioner's arms are bound until the tax court itself says to the taxpayer—and that's what 6215 goes on to say. The Commissioner is bound until the tax court disposes of it.

Let us say he went within the ninety days and the tax court says Mr. Block, in the Block case, we have no jurisdiction, I'm sorry—Mr. Boren in this case—you cannot petition here. Then he comes into this court and points out the fact he never had his day in court for the reason that that very notice is faulty. Your Honor, I think we are precluding the tax court from saying "by registered mail." 6212—not repeated by the way in 13 or 14. It is a silly rule. It [19] protects the taxpayer and the taxpayer says he got the notice.

The Court: I go along with that in cases where there is a dispute and the taxpayer says he never got the notice.

Mr. Hochman: My point is until he goes within the ninety days and says to the tax court I want in this court, he cannot say that he couldn't have gotten in because, as I said, the Commissioner cannot make that assessment.

The Court: Why should we argue it when you have not briefed the point and counsel presents it at the last minute? Let's put it over and do some work. I have plenty of cases where the lawyers brief the points. Why break my neck on cases where you don't brief.

Mr. Hochman: I am sure there is judicial review on this whole body of law and I think the point I make is well taken. Even if the Block case is law you still must have the exhaustion of administrative remedy. You still must have the tax court saying to the petitioner, Mr. Boren, you can't come into this court, and all that time the Commissioner cannot act until the tax court throws him out. The Commissioner is bound.

The Court: Maybe you are right but as I say I have cases which lawyers have briefed. I want to know what this is about. Now, how much time do you want? Want it to go over a week? Two weeks? A week should be enough, shouldn't it? Two weeks?

Mr. Hochman: Pardon me—let's see what—

The Court: You have two problems: One is treating this [20] as a motion for summary judgment. The plaintiff should have a right to make his showing under the rules that govern summary judgments, as to what issues of fact would prevent a summary judgment being granted. And you have not complied strictly with the rule about your set of proposed findings and judgment because you weren't treating it that way. That I am not too concerned with. Too, that rule doesn't help the court very much. I will waive any filing on your

part of the proposed findings and conclusions and judgment because they always have to be redrawn even if the motion is granted.

I would suggest that the plaintiff have an opportunity to make his showing in contradiction to the motion treated as a motion for summary judgment. You will reply again. Secondly, I would like to hear from you both on this point about registered mail and whether a cause for injunctive relief is stated, assuming your point of law is good.

Mr. Brant: You mean the government has assumed validity of the facts—for the purpose of this motion assumed the validity of the facts set forth in our complaint?

The Court: They would be entitled to do that.

Mr. Brant: At that time it was a motion to dismiss and I wonder now as to whether or not the government is willing to make that same assumption for the motion for summary judgment.

The Court: That is what they are able to do. They are entitled to look at your complaint and if you allege something [21] take that fact as being not in dispute.

Mr. Hochman: Conceivably this isn't a motion to dismiss. If the Court does this one thing I question—I know Mr. McHale had this affidavit drawn up in an abundance of caution. He is a good pleader. Within the complaint itself this penalty of fifty per cent is alleged—in Mr. Brant's complaint—exactly one-half fraud penalty. And I believe the entire statute of limitations is false and where that we——

The Court: I want to ask Mr. Brant—there

does not seem to be much dispute this assessment proceeding is a fraud assessment. Can you concede that?

Mr. Brant: No dispute that they are asserting fraud in the notice of proposed deficiency.

The Court: And are basing their assessment on fraud?

Mr. Brant: No dispute on that.

Mr. Hochman: Well then, we return actually to a motion to dismiss?

The Court: Well, except you have that only orally on the record. Can't you get a stipulation and file it with this document that you have as an exhibit to your motion to dismiss as the document that was sent.

Mr. Brant: I believe we can and also handle the other facts in the complaint, your Honor.

Mr. Hochman: That would I think——

The Court: All right. I will put it over two weeks and [22] see what you can find.

Mr. Hochman: Will we have Mr. Brant filing his opposition——

The Court: Mr. Brant, I want to hear from you first. The government filed quite a brief. It is your turn. By Tuesday the 24th file any memorandum you want to in support of this position on this registered mail. The government to file on or before the 30th, if you want to reply. The matter is continued to the 30th at two o'clock. [23]

Certificate

I, Bernice E. Cavin, hereby certify that I am a duly appointed, qualified and acting official court reporter pro tem of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 8th day of May, A.D. 1956.

/s/ BERNICE E. CAVIN,
Official Reporter Pro Tem.

[Endorsed]: Filed July 13, 1956.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, April 30, 1956—2:00 P.M.

The Court: Let's take up Boren versus Riddell.

The Clerk: Clifford O. Boren versus R. A. Riddell, 1822-SD-C, Motion to Dismiss and Motion for Change of Venue.

The Court: Those are both your motions, Mr. Hochman?

Mr. Hochman: Yes, except the Motion for Change of Venue has been waived and abandoned.

The Court: Withdrawn then?

Mr. Hochman: I was looking for a word, your Honor.

The Court: Let the record show the Motion for Change of Venue is withdrawn.

Now, I have read your briefs in the Boren case. Did you have anything else to present that you have not presented in the briefs?

Mr. Brant: There is only one comment that I would like to make and that concerns the Dolezilek versus Commissioner case, the case relied upon by the government in their brief. I would like to point out in connection with that case, that it is clearly distinguishable from the present case in that the notice of proposed deficiency was originally sent out by registered mail, properly addressed, and it has been held in other cases that where that is the case it doesn't matter whether the taxpayer ever received the notice at all, that the Commissioner has fulfilled his duty when he sends it by registered mail and is under no obligation to prove actual receipt of the notice.

The Court: They did not talk about that in the case, did they?

Mr. Brant: Yes, your Honor, they point out in the case that they did receive—it was sent out by registered mail properly addressed.

The Court: Did not talk about the authorities you referred to.

Mr. Brant: No, your Honor. They did not. The case in which that comment is made is Capone versus Larson, which is not officially reported but which appears in 19 A.F.T.R., American Federal

Tax Reports, page 1357.

The Court: Anything else you want to offer, Mr. Hochman?

Mr. Hochman: No, your Honor, I don't. This case, particularly with this dissent, it does discuss this problem and probably is on all fours with this case. The Court has made its own ruling and dealt with its own notice, physical delivery given to the taxpayer by the deputy collector. And I think it does discuss at great length this point of registered mail and notice to taxpayers.

The Court: I notice in your reply brief you discussed some of the cases relied upon by the plaintiff. You did not discuss the Heinemann case in the Third Circuit.

Mr. Hochman: It might be inadvertence. I thought I took all the appellate decisions. I might have missed one. I know I have read them all. [3*]

The Court: Heinemann Chemical Company, 92 Fed. Second 344. Now, he cited also another case in 92 Fed. Second, Van Antwerp versus U. S. But this Heinemann case in the Third Circuit cited and relied upon some of the Board of Tax Appeals decisions. However, in reading that case it leaves a good bit to be desired. The Court started out and talked about how the notice must be given by registered mail. They did not quote the language of the statute, namely, that notice by registered mail is authorized. They paraphrased it and took a rather big hurdle in an easy manner by saying it must be

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

and then quoted about registered mail and then when they came down to citing the Supreme Court case in *Botany Mills* they said: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Well, some more of compounding the evil. I did not read the statute as a limiting of the method in which a notice might be sent. If you read it that way, then maybe the *Botany Mills* case assists, but if the statute does not limit the method and instead authorizes the use of registered mail, it would seem to me it is a matter of logic and common sense that personal notice, whether given by ordinary mail, which is admittedly received, or given by personal service should be the equivalent of anything sent by registered mail. There is no magic in registered mail. The essential thing required is that the taxpayer have notice that a certain deficiency has been levied against him and he may [4] then decide what route he wants to go. Admittedly Boren had notice on April the 14th. Then in insurance law you have provisions that policies may be terminated by registered mail. And there are cases which hold that even though the policies say **that you may terminate the policy by registered mail**, actual notice is the equivalent of the registered mail. As a matter of fact, in logic actual notice is better than registered mail because **registered mail might not get there**, even though there is the presumption that a letter registered will arrive, there is such a thing as letters being lost. And if you cite cases to the effect that—you called my attention to cases. I don't

think you cited them here—that the mailing of the notice by registered mail is legally sufficient even if not delivered. Well, certainly there could be no better notice than actual notice. Now then, the question comes down to whether the Congress intended that that was the only way to notify a man of a deficiency. The statute says the Commissioner is authorized to use registered mail. You would have to spell the word “authorization” to mean something that was not permissive but that is the only way it could be done.

I am not unmindful of the decisions of the Tax Court but I think the government has the better side of the argument and I am going to deny the—going to grant the motion, not as a motion to dismiss but as a motion for summary judgment, in [5] view of the fact that matters outside the record were presented here and are conceded to be true, the government to draw findings of fact and conclusions of law and a judgment within ten days.

Mr. Hochman: That will be fine, your Honor.

The Court: This is an appealable order, I take it?

Mr. Brant: Yes, your Honor. And in that connection I should like at this time to move for an injunction pending appeal under Rule 62(c) for if we pay this tax at this time or if the Collector proceeds to collect the tax then the question on appeal becomes moot. According to my understanding of the decisions where an injunctive relief has been requested if the tax is paid or collected the matter would become moot and we would no longer have

the right to appeal. I think there is no question in counsel's mind about the ability of the taxpayer to pay the assessment, and I have discussed it with him. It is purely a matter of setting it up in some way so that we will have our right of appeal.

The Court: I do not think your motion is timely unless you want me to indicate what I will do when the proper time comes.

Mr. Brant: I appreciate that, your Honor. I realize it is not timely that no judgment has been entered and we have no notice of appeal in. I wanted to bring it up at this point so it wouldn't be necessary for Mr. Hochman to again come down for that purpose. [6]

The Court: Will the government have any opposition to that?

Mr. Hochman: I am not too familiar, your Honor, with Rule 62(c). Mr. Brant did mention that to me. I raised that as a matter of fact with him just before court——

The Court: Well, unless the government—I think the rule covers the situation. It refers specifically to an order refusing an injunction and provides when an appeal is taken from an interlocutory or final judgment denying an injunction the Court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it may consider proper.

Now, has there been any injunction in force up to this time or has the government merely not pro-

ceeded with distress because they knew this action was pending?

Mr. Brant: The latter course is the one that has been followed. No injunction has been sought up to this point because I was informed by the Collector down here they would not proceed until the matter was decided.

The Court: Maybe the Collector will so inform you again on an appeal. I think what you had better do is to make your application after this is entered and confer with the U. S. Attorney. If there is any prejudice, certainly I will require a bond. I do not know the amount of this tax deficiency. I do [7] not know the status of this defendant. If he is good for this amount, it might be one thing. If there is any question then a bond should be posted. The litigant should have a right to test out this decision if he wants to do that.

Mr. Hochman: I will check, your Honor. I can assure counsel the Collector's office here will not move until they hear from us and we assured him we wouldn't do anything——

The Court: All counsel wants is assurance that this man's cats and dogs and bank accounts will not be grabbed pending this appeal and for some reasonable time after a decision. You may work out something that satisfies him, otherwise he could present a motion and you could submit it without argument or whatever you want to do. I would be inclined, unless a good showing is made by the government, to grant the motion.

Mr. Hochman: Fine, your Honor. What we will

do for the present is assure counsel until a judgment is entered in this case nothing will be done or until the motion is made to your Honor.

The Court: All right.

Mr. Brant: Thank you, your Honor.

The Court: Meanwhile your conclusions of law have to cover the other point briefed at the prior hearing as well as this point.

Mr. Hochman: Statute of limitations?

The Court: Statute of limitations question which was [8] pretty well disposed of by the government's brief but the summary judgment to cover both aspects of the case by your findings and conclusions.

Mr. Hochman: We will do so, your Honor.

Mr. Brant: Thank you, your Honor. [9]

Certificate

I, Bernice E. Cavin, hereby certify that I am a duly appointed, qualified and acting official court reporter pro tem of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 8th day of May, A.D. 1956.

/s/ BERNICE E. CAVIN,

Official Reporter Pro Tem.

[Endorsed]: Filed July 13, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 41, inclusive, contain the original

Complaint;

Notice of Motions and Motions to Dismiss together with Memorandum in Support thereof and Exhibit "A";

Memorandum in Opposition to Motion to Dismiss;

Defendant's Reply Memorandum;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Notice of Motion for Injunction Pending Appeal;

Designation of Contents of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court had on April 17, 1956, April 30, 1956, and June 18, 1956, and 2 volumes of Reporter's Transcript of Proceedings had on April 17, 1956, and April 30, 1956, all in the above-entitled cause, constitute the Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the

foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 16th day of July, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15203. United States Court of Appeals for the Ninth Circuit. Clifford O. Boren, Appellant, vs. R. A. Riddell, District Director of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed July 17, 1956.

Docketed July 23, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for
the Ninth Circuit

No. 15203

CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant herewith presents points on which he claims the District Court erred:

1. The Court erred in holding that the Notice of Deficiency mailed to Appellant by ordinary mail was a proper Notice of Deficiency under the provisions of Section 272(a)(1) of the Internal Revenue Code of 1939.

2. The Court erred in holding that the assessment of income taxes, penalties and interest by the Commissioner of Internal Revenue was lawful and proper and the enforcement or collection of said assessment cannot be enjoined.

3. The Court erred in holding that Appellant had failed to exhaust his administrative remedies in that no petition for a redetermination of the deficiency, together with the penalties and interest involved, was filed with the Tax Court of the United States within 90 days after the mailing by ordinary mail of said Notice of Deficiency.

4. The Court erred in holding that Appellee was entitled to judgment that the complaint be dismissed with prejudice, that the injunction be denied and that the Appellee have his costs.

Dated: July 23, 1956.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed July 24, 1956.

No. 15203

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL,

Appellee.

On Appeal From the United States District Court for the
Southern District of California
Southern Division

OPENING BRIEF FOR THE APPELLANT

FILED

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PAUL P. O'BRIEN, CLERK

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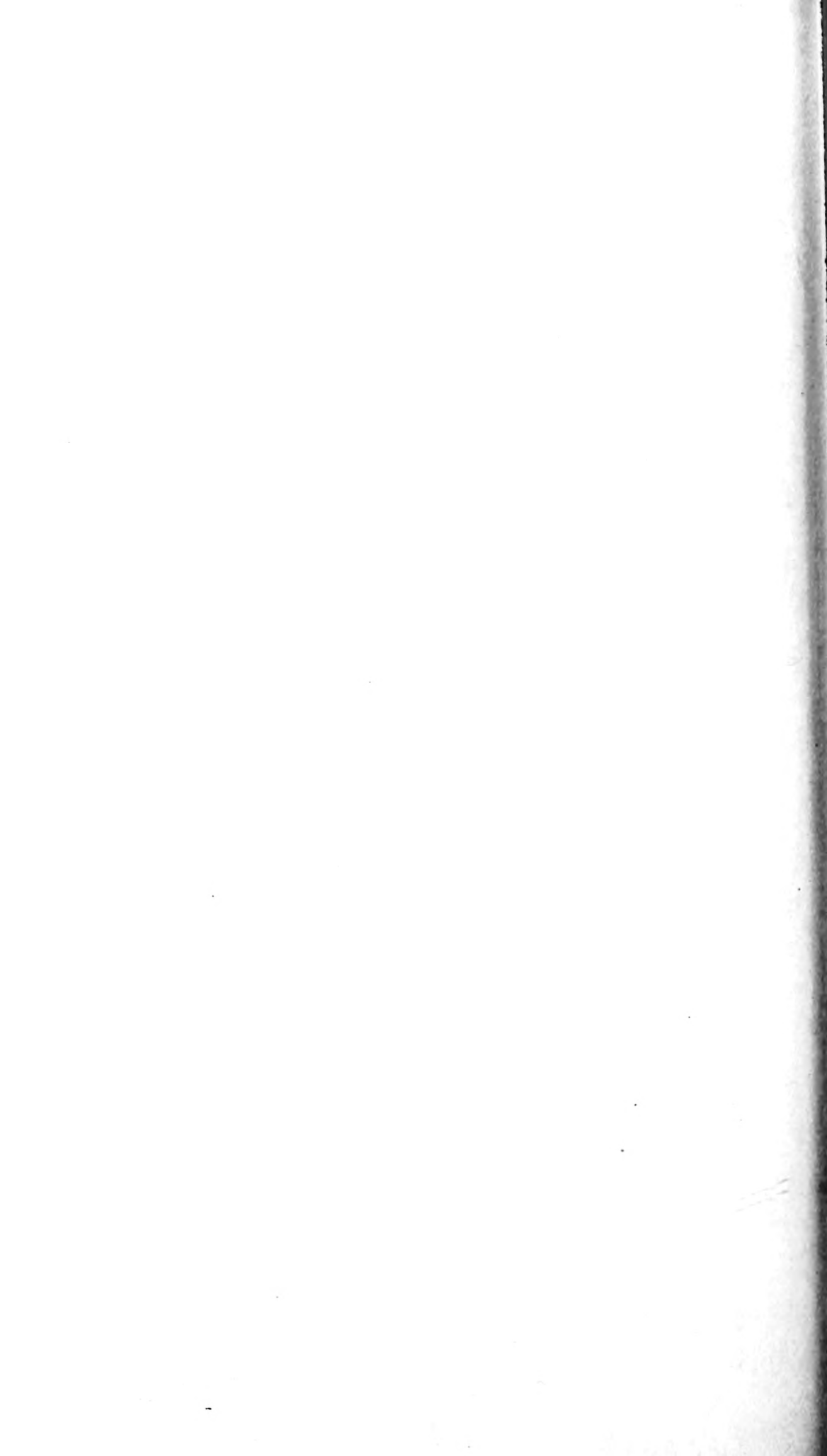
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United States
Federal Reserve
Board of Governors
Washington, D.C.

No. 15203

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL,

Appellee.

On Appeal From the United States District Court for the
Southern District of California
Southern Division

OPENING BRIEF FOR THE APPELLANT

OPINION BELOW

The Findings of Fact and Conclusions of Law [R. 31] of the District Court are not officially reported.

STATEMENT OF JURISDICTION

This action arose in the United States District Court for the Southern District of California, Southern Division, under the jurisdiction granted by Section 1340 of Title 28 of the United States Code.

The Appellant sought an injunction restraining and enjoining the Appellee from making any seizure, collection or distraint of any property belonging to Appellant under the authority of an assessment of income taxes, interest and penalties made by the Commissioner of Internal Revenue against Appellant for the calendar year 1951.

Appellee made a motion to dismiss Appellant's complaint on the grounds that the Court lacked jurisdiction and the complaint failed to state a claim upon which relief could be granted. The motion was supported by an affidavit and the Court treated the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedures 12(b).

The matter was heard on the pleadings and affidavits. On May 8, 1956, the Court made an order that Appellee was entitled to judgment, that the complaint be dismissed with prejudice and that the prayer for injunction be denied. [R. 36]

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291. The order is final and appealable.

Appellant filed Notice of Appeal on June 7, 1956.
[R. 37]

Appellant made a motion for an injunction pending the appeal [R. 37] which was granted. Appellant posted security of a value of \$12,000.00 to protect Appellee's rights pending appeal and for costs.

On July 12, 1956, Appellant filed a designation of contents of record on appeal and reporter's transcripts of proceedings.

The record was prepared by the Clerk of the United States District Court, who filed the same with the Clerk of the United States Court of Appeals for the Ninth Circuit on July 17, 1956. [R. 69, 70] Appellant filed a statement of points on appeal in the United States Court of Appeals for the Ninth Circuit on July 24, 1956.

QUESTIONS PRESENTED

1. Whether under Section 6212(a) of the Internal Revenue Code of 1954, which authorizes the Secretary of the Treasury or his delegate (hereafter referred to as "Commissioner") to send a notice of deficiency of income taxes to a taxpayer by registered mail, a notice of deficiency sent by ordinary mail is valid.

2. Whether the enforcement or collection of an assessment of income taxes, interest and penalties based upon a notice of deficiency sent by ordinarily mail may be enjoined.

3. Whether it was necessary for Appellant to file a petition for a redetermination of the deficiency with the

Tax Court of the United States before seeking injunctive relief.

STATUTES INVOLVED

The pertinent statutes are printed in the Appendix, *infra*.

STATEMENT

The facts are not in dispute.

On March 11, 1955, the Commissioner of Internal Revenue sent a Notice of Deficiency for the calendar year 1951 to the Appellant by registered mail. The notice was not sent to Appellant's last known address and was returned to the Commissioner by the Post Office Department. Appellee conceded that the notice mailed March 11, 1955 was ineffective. [R. 14] The District Court concluded that such notice was of no legal efficacy as a statutory notice of deficiency. [R. 35]

Appellant made and filed a federal income tax return for the calendar year 1951 on or prior to March 15, 1952. [R. 32] The normal period within which a deficiency could be assessed for the year 1951 expired on March 15, 1955.

On April 14, 1955, the Commissioner mailed a Notice of Deficiency to Appellant by ordinary mail, correctly addressed, which was received by Appellant on April 15, 1955. [R. 33] The Notice of Deficiency recited that Appellant had a deficiency for the calendar year 1951 of \$6,490.77 income tax and \$3,245.39 in penalty. [R. 32] The penalty was explained as follows:

“The 50% penalty shown herein has been asserted in accordance with the provisions of Section 293(b) of the Internal Revenue Code of 1939.” [R. 21]

The Appellant did not file a petition for redetermination of the deficiency with the Tax Court of the United States. [R. 34]

On July 22, 1955, the Commissioner assessed against Appellant the income taxes and penalties proposed in the Notice of Deficiency, together with interest in the amount of \$1,305.62. [R. 33]

On November 22, 1955, Appellee gave written notice and demand for payment of the assessment and, on the same date, issued a warrant for distraint. [R. 33]

Appellee has threatened, and is threatening, to distraint, seize and sell real and personal property owned by Appellant and to apply the proceeds thereof to the payment of the assessment. Unless restrained Appellee will levy upon, seize and sell Appellant's property, and all other property which Appellant may hereafter own or acquire. [R. 34]

I

ARGUMENT

A NOTICE OF DEFICIENCY SENT BY ORDINARY MAIL CONTRARY TO STATUTE IS INEFFECTIVE FOR ANY PURPOSE

The appeal presents the primary question of whether a notice of deficiency sent in a manner not authorized by statute is a valid statutory notice.

It is mandatory for the Commissioner to give notice of a deficiency by registered mail.

Section 6212(a), IRC 1954, provides:

“If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A and B, he is *authorized* to send notice of such deficiency to the taxpayer *by registered mail*.” [Emphasis added]

Section 6213, IRC 1954, provides in part:

“Within 90 days . . . after the notice of deficiency *authorized* in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in Section 6861 [relating to jeopardy assessments not here involved] no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in Court for its collection shall be made, begun, or prosecuted *until such notice* has been mailed to the taxpayer . . . ” [Emphasis added]

These provisions are substantially the same as Section 272(a) of IRC 1939.

The proper mailing of a notice of deficiency is essential to suspend the statute of limitations on assessment and collection; to set in operation the statutory period within which the taxpayer may appeal to the Tax Court, and is a condition precedent to assessment of a deficiency and the commencement of distraint or other proceedings for collection of the tax. [Sections 6212(a), 6213, IRC 1954; Section 272(a), IRC 1939]

The Tax Court has consistently held that mailing a notice of deficiency by ordinary mail does not comply with the statute so as to give the Court jurisdiction.

In *John A. Gebelein, Inc. v. Commissioner*, 37 B.T.A. 605, the Commissioner of Internal Revenue sought to obtain a dismissal of a taxpayer's petition for redetermination on the ground, among others, that there was no statutory notice of deficiency because it was not sent by registered mail. In agreeing with the Commissioner the Board of Tax Appeals, now the Tax Court, stated:

“The statute says that if the Commissioner determines a deficiency he is authorized to notify the taxpayer thereof by registered mail. ‘When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.’ *Botany Worsted Mills v. United States*, 278 U.S. 282. See *Henry M. Day*, 12 B.T.A. 161. Since the notice attached to the petition was not sent by registered mail, it may not be regarded as an authorized notice of deficiency. *Heinemann Chemical Co. v. Heiner*, *supra*. The petition is therefore prematurely filed and, for want of jurisdiction, the proceeding must be dismissed.”

In *Oscar Block, et al v. Commissioner*, 2 T.C. 761, the Tax Court reiterated this position and stated:

“Congress clearly stated that the mailing should be by registered mail and that the 90-day period should start from that date. It undoubtedly had a purpose in this and one of its purposes was, no doubt, to eliminate, as far as possible, any uncertainty as to the beginning of this critical period. A holding for the

petitioners in this case would deprive the statute of some of the important benefits which Congress intended should be derived from it. The petitioners have failed to allege facts which would give the Court jurisdiction in this proceeding.”

See also *Midtown Catering Co. v. Commissioner*, 13 T.C. 92, at page 95.

“It is to be noted that Congress, through the provisions of Section 272(a)(1) [now Sections 6212(a) and 6213, IRC 1954] has carefully outlined the steps the Commissioner of Internal Revenue must take in moving to the assessment and collection of deficiencies in income tax and, similarly, has prescribed the steps a taxpayer may take if he desires to litigate such liability through the Tax Court of the United States. First, the Commissioner, upon the determination of a deficiency, is ‘authorized’ to send notice of such deficiency to the taxpayer by registered mail and, while by terms the sending of a notice by registered mail appears to be permissive, the provisions of the section which follow indicate that such procedure is mandatory, if the tax is to be finally determined and collected.” *Rebecca S. Hamilton v. Commissioner*, 13 T.C. 747, at 749.

The fact that the taxpayer actually received the notice mailed by ordinary mail does not affect the result. In order to have a statutory notice of deficiency registered mail is a prerequisite. Personal service of a notice of deficiency has been held insufficient. *Henry M. Day v. Commissioner*, 12 B.T.A. 161, at 163. “Any other method of notice does not comply with the statute and is invalid. The method

directed by the statute is mandatory.” *Heinemann Chemical Co. v. Heiner, Collector of Internal Revenue*, 92 F.2d 344, CCA-3 (1937). Furthermore, if the notice of deficiency is sent by registered mail properly addressed, the fact that it is never received by the taxpayer does not affect the validity of the notice. *Alma Helfrich v. Commissioner*, 25 T.C., No. 51; *Dolezilek v. Commissioner*, 212 F.2d 458, (D.C. Cir. 1954) In the latter case the notice was sent by registered mail, properly addressed, but was returned by the Post Office Department “Unclaimed — Refused”, and was later delivered by a Deputy Collector in person. It was held that the date of mailing the notice was controlling rather than the date of actual receipt.

Since the notice of deficiency was not sent by registered mail, it may not be regarded as an authorized notice of deficiency and it was therefore ineffective for any purpose.

II

THE ENFORCEMENT OR COLLECTION OF AN ASSESSMENT BASED UPON A NOTICE OF DEFICIENCY SENT BY ORDINARY MAIL MAY BE ENJOINED

Subject only to two qualifications, one statutory and one equitable, a taxpayer cannot maintain a suit for the purpose of restraining any proper officer from assessing or collecting a Federal tax. The statutory exception to this general rule relates to premature attempts to collect a tax, and the equitable exception, to cases of extraordinary hardship.

The general rule forbidding actions to restrain the collection of taxes is expressed in Section 7421 of the Internal Revenue Code of 1954 as follows:

“(a) Tax.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.”

The statutory exceptions to this general rule which are here applicable are Sections 6212(a) and 6213(a), IRC 1954:

Section 6212(a) provides:

“Sec. 6212. NOTICE OF DEFICIENCY. (a) IN GENERAL — If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.”

Section 6213(a) provides in part as follows:

“Within 90 days, . . . after the notice of deficiency authorized in section 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, . . . Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or

levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.”

Under these sections, the Secretary of the Treasury, or his delegate, is “*authorized* to send notice of such deficiency to the taxpayer by *registered mail*.” “Within 90 days . . . after the notice of deficiency *authorized* in section 6212 is *mailed* . . .” the taxpayer has the right to petition the Tax Court for a redetermination. Section 6861 referred to in Section 6213(a) relates to jeopardy assessments and except for such assessments “no assessment of a deficiency in respect of any tax . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted *until such notice* has been mailed to the taxpayer, . . .”

If the Commissioner makes an assessment of a deficiency, or a levy, or commences a proceeding in Court for the collection of an assessment without first having given the notice authorized by Section 6212(a), Section 6213(a) specifically authorizes injunctive relief.

The plain and sole purpose of Section 6213(a), IRC 1954, is to guarantee to the taxpayer that he shall not be deprived of the administrative process, with appeal to the Tax Court. *Ventura Consolidated Oil Fields v. Rogan*, 86 F.2d 149, at 155, CCA-9; *Van Antwerp v. U.S.*, 92 F.2d 871, at 874, CCA-9.

If the Appellee is not enjoined, there will be a seizure of Appellant’s property without due process of law.

A taxpayer is entitled to a valid notice of deficiency. The notice, if valid, gives the taxpayer the important right to petition the Tax Court for a review of the Commissioner’s determination without first paying the tax. The purpose

of the statutory exception to the general rule prohibiting injunctions is to guarantee this right to the taxpayer. If the notice is not given as required by the statute, the Tax Court will not entertain jurisdiction and the taxpayer is deprived of this remedy. To permit an assessment to be enforced without a valid statutory notice of deficiency would give the Commissioner the right to grant or withhold the right of appeal to the Tax Court at will. It is respectfully submitted that the purpose of Section 6213(a) of the Internal Revenue Code of 1954 is to prevent this result.

“There is nothing inequitable in the relief asked by the plaintiffs. It is the very relief accorded them by and under the precise terms of the statutes making a violation of its terms an express exception to the general prohibition of section 3652(a) [now section 7421(a)]. An essential part of the whole statutory scheme of furnishing the taxpayer with an option either to pay and sue to recover back or to apply for relief to the Tax Court, section 272(a)(1) [now Section 6213(a)] was not enacted as a mere idle gesture. The commissioner is as bound as the taxpayer is by its terms. This is made plain not only in the language of the statute but in the language of the cases construing and applying it, . . .” *Maxwell v. Campbell*, 205 F.2d 461, at 463 CCA-5.

The Appellee contended in the lower Court, and the Court found, that since the Notice of Deficiency asserts a penalty under Section 293(b) of the Internal Revenue Code of 1939, the assessment is valid even though notice was mailed more than three years from the due date of the

return. [R. 35] If Appellee's position is correct, no prejudice would be suffered by requiring that a new notice of deficiency be sent in the manner authorized by the statute. This would impose upon the Commissioner the simple task of sending a new notice of deficiency by registered mail. This burden should be contrasted with the fact that the procedure followed by the Commissioner has deprived the taxpayer of his right of appeal to the Tax Court.

III

IT WAS NOT NECESSARY FOR APPELLANT TO FILE A PETITION WITH THE TAX COURT BEFORE SEEKING INJUNCTIVE RELIEF

The notice of deficiency is the final administrative determination of the Commissioner. This notice gives the taxpayer the right to appeal to the Tax Court for a redetermination. "It is the notice of the final determination of the deficiency contained in the 'registered letter' that gives the taxpayer the right to appeal. Until such notice of the final determination of the deficiency had been sent in the present case by 'registered mail' as the statute required, so that appeal might be taken to the Board the Collector did not have the right to seize the money belonging to the taxpayer." *Heinemann Chemical Co. v. Heiner*, 92 F.2d 344, CCA-3.

Reviewable agency action before the Tax Court is predicated upon a final determination by the Secretary of the Treasury or his delegate. Interlocutory agency action

is not reviewable by the Tax Court. A notice of deficiency sent by registered mail is the final determination which will confer jurisdiction upon the Tax Court. Notice by any other means is not a final, reviewable agency action.

A taxpayer is not required to go through the meaningless gesture of filing a petition with the Tax Court for the purpose of being told by the Tax Court that it has no jurisdiction.

CONCLUSION

It is mandatory that a notice of deficiency be sent by registered mail as authorized by the statute. If sent by ordinary mail, it is ineffective for any purpose.

Where a notice is not sent by registered mail the taxpayer is specifically granted the right by statute to seek injunctive relief in the proper Court, which is the United States District Court.

Without a valid notice of deficiency there is no final determination upon which a taxpayer could seek review by the Tax Court. The taxpayer has, therefore, no administrative remedy to exhaust.

The Judgment and Order of the District Court should be reversed.

Respectfully submitted,

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By: John A. Brant,

Attorneys for Appellant

October, 1956

INTERNAL REVENUE CODE OF 1954

SEC. 6212. NOTICE OF DEFICIENCY

[Sec. 6212(a)]

(a) IN GENERAL.— If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.

Source: Sec. 272(a) (part), 871(a) (part), 1012(a) (part), 1939 Code, substantially unchanged.

[Sec. 6212(b)]

(b) ADDRESS FOR NOTICE OF DEFICIENCY.

(1) INCOME AND GIFT TAXES.— In the absence of notice to the Secretary or delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

Source: Secs. 272(k), 1012(j), 1939 Code.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

[Sec. 6213(a)]

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.— Within 90 days, or 150

days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Source: Secs. 272(a) (part), 871(a) (part), 1012(a) (part), 1939 Code, substantially unchanged.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

[Sec. 7421(a)]

(a) TAX.— Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Source: Sec. 3653(a), 1939 Code.

INTERNAL REVENUE CODE OF 1939

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) PETITION TO BOARD OF TAX APPEALS.— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of

Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * *

(b) FRAUD.— If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

No. 15203

**In the United States Court of Appeals
for the Ninth Circuit**

CLIFFORD O. BOREN, APPELLANT

v.

**R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL
REVENUE, APPELLEE**

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DIS-
TRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

BRIEF FOR THE APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,203

CLIFFORD O. BOREN, APPELLANT

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL
REVENUE, APPELLEE

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DIS-
TRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 31-36) are not officially reported.

JURISDICTION

This appeal involves a deficiency in federal income taxes for the calendar year 1951 and 50% fraud penalty as determined by the Commissioner of Internal Revenue and assessed on July 22, 1955, against taxpayer in the respective sums of \$6,490.77 and \$3,-245.39, together with statutory interest thereon in the sum of \$1,305.62, aggregating \$11,041.78. (R. 6, 32-33). The disputed assessment was made by the Commissioner more than 90 days after he had timely

mailed to the taxpayer on April 14, 1955, a statutory notice of deficiency from which the taxpayer, upon receipt thereof on April 15, 1955, filed no petition with the Tax Court for redetermination of the deficiency and the additions thereto. (R. 34.) Upon the delivery to the taxpayer by the Director of a written notice and demand for payment of the amount of the assessment, plus the statutory interest on November 22, 1955, and the issuing of a warrant for distraint on the same date (R. 33), the taxpayer, failing to make payment thereof, thereupon filed this action in the court below on December 15, 1955, under the provisions of 28 U. S. C., Section 1340, to restrain and enjoin the assessment and collection of the income tax, fraud penalty and statutory interest. (R. 3-9.) The Director thereupon filed motions to dismiss for lack of jurisdiction over the subject matter of the taxpayer's action under the provisions of Section 7421 (a) of the Internal Revenue Code of 1954 (R. 9-22), which the District Court, over the taxpayer's opposition (R. 22-23), granted on April 30, 1956. (R. 31-36.) Judgment was thereupon entered in favor of the Director, with costs, on May 10, 1956. (R. 36-37.) Within 60 days and on June 7, 1956, notice of appeal was filed by taxpayer. (R. 37.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in granting the Director's motion to dismiss and in holding that it did not have jurisdiction of this suit seeking to enjoin the Director from making any seizure, collection or dis-

traint of any of the taxpayer's property pursuant to the assessment of the deficiency in income tax, fraud penalty and statutory interest as determined and asserted by the Commissioner for the taxable year 1951.

STATUTES INVOLVED

These are printed in the Appendix, *infra*.

STATEMENT

The pertinent facts were found by the District Court substantially as follows (R. 32-34):

On or before March 15, 1952, the taxpayer filed a federal income tax return for the calendar year 1951. (R. 32.)

On March 11, 1955, the Commissioner sent the taxpayer a statutory notice of deficiency (so-called 90-day letter) by registered mail (R. 19-22) which recited that the taxpayer had deficiencies in income tax and fraud penalties in the respective sums of \$6,490.77 and \$3,245.39.¹ The latter amount is 50% of the deficiency in tax and represents a fraud penalty asserted by the Commissioner in accordance with the provisions of Section 293 (b) of the Internal Revenue Code of 1939. (R. 32-33.) The notice of defi-

¹ This notice of deficiency, as reprinted in the record (R. 19-22), bears the erroneous date of June 29, 1955, due to a mistake in printing. The official copy thereof in the Treasury Department files shows the correct mailing date of the deficiency notice to have been "MAR 11 1955," the date as alleged by the taxpayer (R. 4) and as found by the District Court. (R. 32-33.). Two other dates appearing on the original, made thereon by rubber stamp impressions for inter-office "Records" purposes of the Treasury Department, are "JUN 29 1955" and "JUL 11 1955," the former of which was mistakenly used by the printer in the record. (R. 19.)

ciency was returned to the Commissioner by the Post Office Department because the taxpayer had moved to a different address. At the time of the mailing thereof on March 11, 1955, to the taxpayer's old address, the Commissioner had actual notice and knowledge of the taxpayer's new address. (R. 33.)

On April 14, 1955, the Commissioner remailed the notice of deficiency by ordinary mail to the taxpayer's correct address. The taxpayer admits having received this notice of deficiency on April 15, 1955. (R. 33.)

On July 22, 1955, the Commissioner assessed deficiencies in income taxes and fraud penalties against the taxpayer in the respective sums of \$6,490.77 and \$3,245.39, as referred to in the above-mentioned notice of deficiency, together with statutory interest thereon in the total sum of \$1,305.62. The total amount of the assessment was \$11,041.78. (R. 33.)

On November 22, 1955, the Director, through his agent and representative, W. Howard Ferry, Jr., delivered to the taxpayer's attorney a notice and demand in writing that the taxpayer pay the amount of the above-mentioned assessment, and on the same date he issued a warrant of distraint concerning that assessment. (R. 33.)

The taxpayer is the owner of real and personal property, situated in the Sixth Internal Revenue Collection District of California, which is subject to distraint. The Director has threatened and is threatening to distrain, seize and sell the property of the taxpayer which may be found within that Collection District and to apply such property or the pro-

ceeds thereof to the payment of the assessments in question. Unless restrained and prohibited by the decree of the District Court, the Director will levy upon, seize and sell the taxpayer's property as well as all his other property which he may hereafter own or acquire within the above-mentioned collection district. (R. 34.)

The taxpayer did not file a petition for redetermination of the above-mentioned deficiencies in taxes and penalties with the Tax Court within 90 days after the mailing of the notice thereof by the Commissioner on April 14, 1955, nor had he done so up to the date the instant action was instituted. The taxpayer still has an opportunity to contest the controverted assessment of the deficiencies in tax, penalty and interest on the merits by paying the sums in question and administratively filing a claim for refund before pursuing his legal remedies in the Federal District Court or in the Court of Claims. (R. 34.)

Upon a consideration of the foregoing facts (R. 32-34) and/or allegations (R. 4-9), the District Court, pursuant to the Government's motion (R. 9-22), entered its judgment dismissing the taxpayer's suit for lack of jurisdiction on May 10, 1956 (R. 36-37). From the judgment so entered, the taxpayer appealed to this Court for review. (R. 37.)

SUMMARY OF ARGUMENT

The taxpayer's contention that the District Court had jurisdiction under 28 U. S. C., Section 1340, and therefore erred in granting the Government's motion

to dismiss his suit for injunctive relief, is without merit. The taxpayer has failed to show, in respect of the single position advanced below, that the District Court erred in holding that the Commissioner's assessment of the deficiencies in tax and fraud penalty made pursuant to the deficiency notice in question mailed to him at his last known business address was proper and timely under the pertinent statute. The taxpayer has also failed to show that the District Court erred in holding that the taxpayer, before bringing this action, had not pursued and exhausted his available administrative remedies for determination of the propriety of the deficiencies thus asserted against him and assessed by the Commissioner. As to the first proposition, the record shows that of all the documents filed by the taxpayer with the Commissioner during the entire period in question, the last one (power of attorney) showed his business address, to which the Commissioner mailed the disputed deficiency notice. Hence, this, without more, clearly shows that the deficiency notice in question was proper and timely under the pertinent statute, and therefore the Commissioner's assessment of the deficiencies in tax and fraud penalty was also timely and valid because made under the fraud—no limitation statute providing that assessments in fraud cases may be made at any time, without limitation.

The taxpayer upon appeal, however, has apparently abandoned the above mentioned position urging invalidity of the Commissioner's deficiency notice because it allegedly was not sent to his last known

address, and now for the first time adopts a new position urging invalidity of the notice of deficiency because sent to him by ordinary mail, instead of by registered mail. Since this issue was neither raised below nor considered by the District Court, this Court, under the authorities, is not called upon to consider it but is duty bound to pass it. In the event this Court should nevertheless decide to consider the newly-raised issue, however, we submit that there is no merit in the taxpayer's contentions advanced in respect thereto. This is shown by the fact that the statute, pursuant to which the disputed deficiency notice was sent out by the Commissioner, merely *authorized*—a permissive word at most—the Commissioner to send the notice of deficiency to the taxpayer at his last known address by registered mail, without specifying that it *must* be sent by such mail. This, of course, left the mode of serving the deficiency notice on the taxpayer within the Commissioner's discretion as to how and in what manner it should be done *effectively* according to the circumstances involved (that is, by registered mail, ordinary mail, manual delivery by revenue agents, etc.). The statute was so designed by Congress as to make sure that the taxpayer would certainly, if possible, receive the notice in timely fashion in order to have full opportunity to file a petition for redetermination of the deficiency, of which he is thus notified, with the Tax Court, if he so chooses. This is shown by the corresponding statute, first enacted by Congress upon establishing the Board of Tax Appeals in the 1924 Taxing Act, wherein it was

made mandatory that the Commissioner *must* send out notices of deficiencies by registered mail, service thereof upon the taxpayer in any event clearly being the criterion, as the legislative history of that statute shows.

The mandatory provision of the 1924 statute, however, was deleted and amended by the corresponding provision enacted in the 1926 taxing Act wherein Congress for the first time merely authorized—instead of required, as theretofore—the Commissioner thereafter to send out notices of deficiencies by registered mail. The legislative history thereof clearly indicates that service of the notice of deficiency on the taxpayer was there also the specified objective sought—even by other means if ineffective by registered mail, as had theretofore developed in many cases—to the end that the taxpayer would certainly receive the notice and be afforded the opportunity to appeal to the Tax Court (then the Board of Tax Appeals) for redetermination of the deficiency. Moreover, that the statutory authorization was so designed as to leave it within the discretion of the Commissioner as to what means of service should be used effectively to deliver the notice of deficiency to the taxpayer is shown by the decisions holding a deficiency notice valid and proper under the statute where it was first sent to the taxpayer by registered mail, returned to the sender by the postal authorities because acceptance thereof was refused by the taxpayer, and thereafter served upon the taxpayer, not by registered mail, but manually by a revenue agent in person. This, indeed, is comparable to the situation

in the instant case where the deficiency notice was held valid by the District Court where it was first sent to the taxpayer by the Commissioner by registered mail, returned to the Commissioner by the postal authorities, and thereafter remailed to the taxpayer by ordinary mail, which he admittedly received on the next day after the remailing. In both of these instances, registered mail proved ineffective and therefore the Commissioner was obliged, under his authorization, to serve the deficiency notices upon the respective taxpayers by other means which would be, and were, effective within the contemplation of the statute. From the foregoing, it is clear that the taxpayer, even by abandoning his previous untenable position below and adopting a new position equally untenable here, has nevertheless not been able to show that the disputed deficiency notice, remailed to him by ordinary mail and thereby effectively delivered to him, is in anywise defective.

As to the injunctive relief sought by the taxpayer, the District Court properly found and held that, contrary to the taxpayer's contentions, he is not entitled to such relief because he failed to pursue and exhaust his statutory administrative remedies available for the redetermination of the propriety of the deficiencies in tax and fraud penalty, as asserted and timely assessed against him by the Commissioner, together with statutory interest thereon. Moreover, the taxpayer has failed to show any extraordinary reason or condition as to why the injunctive relief sought by him should be granted. It follows, as the District correctly held, that in the light of the broad

and mandatory provisions of Section 7421 of the 1954 Code, the enforcement and collection of the deficiencies in question cannot be lawfully enjoined.

ARGUMENT

The District Court did not err in granting the Government's motion to dismiss for want of jurisdiction

The question presented here is whether the District Court erred in granting the Government's motion to dismiss and in holding that it did not have jurisdiction of this action, brought by the taxpayer under 28 U. S. C., Section 1340. In his complaint in this case, the taxpayer prayed that the Director be restrained and enjoined from making any seizure, collection or distraint of any of his property pursuant to the assessment of the deficiency in income tax, fraud penalty and statutory interest, as determined and asserted against him by the Commissioner in his statutory notice of deficiency sent him on April 14, 1955, for the taxable year 1951, under the provisions of Section 272 (a) (1) and (k), and assessed under Sections 276 (a) and 293 (b), all of the Internal Revenue Code of 1939. (Appendix, *infra*.) In the court below the taxpayer contended that the Commissioner's notice of deficiency mailed to him at his last known business address by ordinary mail on April 14, 1955, instead of at his new residence, was an improper notice under the pertinent statute and therefore the assessment made by the Commissioner on July 22, 1955, was untimely and unlawful. The District Court rejected this contention and also denied the taxpayer's prayer for injunctive relief, and we submit properly so.

The taxpayer furnishes no argument in his brief in this Court in respect of the sole contention made below—alleged invalidity of the Commissioner's deficiency notice because it was purportedly not mailed to him at his last known address; hence, it is assumed that he has now abandoned this contention upon appeal. However, since that contention was made with respect to the same statute (Section 272 (a) (1) and (k) of the 1939 Code)² as is the contention he is now making for the first time on appeal (R. 71; Br. 5-13)—alleged invalidity of the deficiency notice because sent to him *by ordinary mail*, instead of by registered letter—and both issues have a collateral bearing on each other, we treat first the former contention urged below, to the extent considered necessary and helpful here, even though apparently abandoned.

A. The Commissioner's notice of deficiency remailed to the taxpayer at his last known address by ordinary mail on April 14, 1955, was a valid, effectively-mailed statutory notice of deficiency, and therefore the assessment in question was timely

The taxpayer concedes (Br. 4), as he did below (R. 4, 5), that the Commissioner's first deficiency

² Actually the taxpayer cites and relies in this connection on Section 6212 (a) and (b) (1) of the 1954 Code, (Appendix, *infra*) (Br. 6, 10, 15), as he did in the court below (R. 4, 23). That section, however, applies only to taxes imposed by the 1954 Code for taxable years beginning after December 31, 1953. (See Section 7851 (a) (1) (A) and (6) of the 1954 Code.) Corresponding thereto is Section 272 (a) (1) and (k) of the 1939 Code which is the law applicable to the taxable year 1951 here involved. (Br. 6; R. 71.) However, as the taxpayer states (Br. 6), the provisions of both Sections 272 of the 1939 Code and Section 6212 of the 1954 Code are substantially the same.

notice mailed to him by registered letter on March 11, 1955, to his former residential address (4511 Utah Street) and returned to the sender by the Post Office Department, was remailed to him by that official by regular mail at his last known business address (4965 El Cajon Boulevard) on April 14, 1955, and was received by him on the next day, as the District Court found (R. 32-33). The taxpayer's sole contention below was that he is entitled to injunctive relief on the ground that the assessment in question is void because the Commissioner's deficiency notice remailed to him at his business address—instead of at his new residence (6244 Perique Street)—on April 14, 1955, and admittedly received by him on the next day, was not mailed to him at his last known address, as required by Section 6212 (b) of the 1954 Code.³ (R. 4-5, 8-9, 22-23.) The District Court, as pointed out, rejected this contention, and found and held upon the record that the Commissioner's deficiency notice remailed by ordinary mail to the taxpayer at his last known business address on April 14, 1955, and received by him on the next day was a proper *statutory* notice of deficiency, timely given under the pertinent statute because fraud was alleged therein under Section 293 (b), and hence the deficiency assessment was not barred by the ordinary three-year statute of limitations (Section 275 (a)) (Appendix, *infra*)⁴ but was

³ This should be, correctly, Section 272 (a) (1) and (k) of the 1939 Code. (See footnote 2, *supra*.)

⁴ Section 6501 (a) of the 1954 Code, erroneously referred to by the taxpayer in the complaint as prohibiting the assessment here in question (R. 4, par. IV), does not apply to the tax, penalty and

timely made under Section 276 (a) of the 1939 Code. (R. 33, 35.)

The pertinent statute provides that if the Commissioner determines that there is a deficiency in respect of the income tax for the taxable year involved, then he “is *authorized* to send notice of such deficiency to the taxpayer by registered mail,” and that such notice shall be sufficient for purposes of the statute “if mailed to the taxpayer at his last known address.” [Italics supplied.] Section 272 (a) (1) and (k) of the 1939 Code. The taxpayer alleged in his complaint in the District Court that he had several other later addresses as listed therein, all of which the Commissioner, before mailing the deficiency notice to his business address, had been put on notice and had actual knowledge of by virtue of the various documents he had filed with that official but that the Commissioner nevertheless improperly sent the deficiency notice to his business address. (R. 4-7). Hence, he urged below that the deficiency notice, though received by him, was defective because it “was not mailed to the taxpayer at his last known address” as required by the statute, and therefore injunction should lie. (R. 22-23.) These allegations and contentions, however, are not supported by the record. The record shows, rather, that the taxpayer had filed with the interest as assessed by the Commissioner for the taxable year 1951, all of which were imposed by the 1939 Code. See Section 7851 (a) (1) (A) and (6) of the 1954 Code. Section 275(a) of the 1939 Code (Appendix, *infra*) corresponds to Section 6501 (a) of the 1954 Code, as pointed out by the Director in the court below. (R. 14.)

Commissioner from time to time a number of documents—his income tax return for 1952 filed on or before March 15, 1953; his 1953 return, together with his declaration of estimated tax for 1954, both filed on or before March 15, 1954, his power of attorney executed and filed with the Commissioner on or about May 11, 1954, etc.—showing his several successive residential addresses and also his business address (all in San Diego, California), of which, he alleged, his residential address has been “6244 Perique Street” since April 11, 1952, and his business address has been “4965 El Cajon Boulevard” since March 9, 1951. (R. 5-7.) Of all these documents, however, it will be noted that the last one filed with the Commissioner was the taxpayer’s power of attorney lodged with that official on or about May 11, 1954, giving only his business address above mentioned, the receipt of which was acknowledged by the Commissioner on September 29, 1954. (R. 6.) Hence, that business address was the latest and last address of the taxpayer of which the Commissioner had notice and knowledge at the time of his mailing the deficiency notice on April 14, 1955 (R. 5-7), and therefore the notice was proper and correct under the terms of the statute and the decisions cited hereinafter.

Any other conclusion would result in the Commissioner’s being faced with a task of such magnitude as to be impossible of execution, clearly one never contemplated or intended by Congress other than to facilitate and insure actual delivery to taxpayers of the Commissioner’s notices of deficiencies. This is

shown quite plainly by the legislative history of Section 272 (k) of the Revenue Act of 1928, c. 852, 45 Stat. 791—identical with Section 272 (k) of the 1939 Code here involved—where Congress for the first time added the term “at his last known address” to the taxing statutes⁵ for the reason that—

It is obviously impossible for the Commissioner to keep an up-to-date record of taxpayers' addresses. Where a taxpayer has changed his address without notifying the Commissioner, it is not possible to be sure that the deficiency letter is being sent to his last address.⁶

It necessarily follows, we submit, that Congress may not be properly considered to have intended otherwise than that any deficiency notice sent out by the Commissioner to a taxpayer at his last known address to the extent knowable and/or ascertainable, and actually delivered to and received by the taxpayer, as here (R. 5, 33), by whatever method of service used therein within his statutory authorization, “shall be sufficient” notice of a deficiency for the pur-

⁵ Report of the Committee on Ways and Means in respect of the addition of subsection (k) to Section 272 of the 1928 Act (H. Rep. No. 2, 70th Cong., 1st Sess., pp. 22-23 (1927) (1939-1 Cum. Bull. (Part 2) 384, 399); likewise, S. Rep. No. 960, 70th Cong., 1st Sess., p. 30 (1928) (1939-1 Cum. Bull. (Part 2) 409, 430).

⁶ In this connection, the reports of the Commissioner of Internal Revenue for the seven fiscal years ended June 30, 1950-1956, show that there were filed by all taxpayers more than 360,040,000 tax returns of all kinds during the four fiscal years ended June 30, 1952-1955, the period during which the taxpayer's 1951 return was filed in 1952 until the instant action was filed on December 15, 1955. (R. 5, 9.)

poses of the statute (Section 272 (k), 1939 Code). Hence, it is clear that actual effective delivery to and service upon the taxpayer of the notice of deficiency was clearly the sole objective and intent of Congress in enacting Section 272 (a) (1) and (k), to the end that the taxpayer-recipient shall be put on notice and have sufficient time and opportunity to file a petition for redetermination of the deficiency with the Tax Court if he chooses. *Dolezilek v. Commissioner*, 212 F. 2d 458 (C. A. D. C.). Whether or not the taxpayer, upon actual receipt of the deficiency notice, however, chooses to exercise his statutory right of appeal to the Tax Court, we submit, is clearly immaterial.

In these circumstances, it is clear that the taxpayer, by his own allegations in his complaint below, established the fact that the Commissioner's deficiency notice in question constituted a valid and effectively served statutory notice of deficiency within the meaning of the statute, as the District Court correctly held. (R. 33, 35.) The Commissioner's deficiency notice sent to the last known business address given on the taxpayer's power of attorney was sufficient. *Parker v. Commissioner*, 12 T. C. 1079, 1081-1083. Moreover, it has been held that the Commissioner's mailing of the deficiency notice even to the usual business address of the taxpayer is a sufficient compliance with the statute, in order to warrant his making the assessment involved. *United States v. National City Bank of New York*, 32 F. Supp. 890, 892 (S. D. N. Y.); compare *Dolezilek v. Commissioner*, 212 F. 2d 458, 459-460, 462 (C. A. D. C.); *Eppler v. Commissioner*, 188

F. 2d 95, 97 (C. A. 7th); *Commissioner v. Stewart*, 186 F. 2d 239, 241 (C. A. 6th); *Commissioner v. Rosenheim*, 132 F. 2d 677 (C. A. 3d); *Clark's Estate v. Commissioner*, 10 T. C. 1107, affirmed, 173 F. 2d 13 (C. A. 2d); *Whitmer v. Lucas* (N. D. Ill.), decided April 28, 1931 (15 A. F. T. R. 643), affirmed, 53 F. 2d 1006 (C. A. 7th), certiorari granted and proceeding vacated, with directions to District Court to dismiss, 285 U. S. 529.

Such cases as *Ventura Consolidated Oil Fields v. Rogan*, 86 F. 2d 149 (C. A. 9th), certiorari denied, 300 U. S. 672, and *Slaven v. United States* (S. D. Cal.), preliminary injunction granted October 21, 1952 (45 A. F. T. R. 1168), permanent injunction granted June 2, 1953 (45 A. F. T. R. 1256), for example, among others cited and relied on heavily by the taxpayer in the District Court (R. 22-23, 28-29), are distinguishable. The Government distinguished the *Ventura* case below on the ground that no 60-day statutory deficiency notice, as such, was ever mailed by the Commissioner to the taxpayer as then required by Section 274 (a) of the Revenue Act of 1924. Likewise, in the *Slaven* case, the Commissioner sent the 90-day deficiency notice by registered mail to the taxpayer's previous address and not to her last known address of which he had actual notice, and there was no subsequent remailing or effective delivery of the notice to the taxpayer, as here.

The foregoing, we submit, discloses the necessity for the taxpayer's now abandoning his sole untenable original contention urged, relied on by him, and considered by the court below, and adopting a new

whereas no prejudice would be suffered by requiring that a new notice of deficiency be sent by the Commissioner in the manner authorized by the statute. (Br. 9-13.) The taxpayer relies on the provisions of the first sentence of Section 272 (a) (1) of the 1939 code,^s heretofore quoted in connection with the "last known address" argument, *supra*, namely, that the Commissioner, upon determining a deficiency for the taxable year, "is authorized to send notice of such deficiency to the taxpayer by registered mail." On the basis of this statutory authorization, the taxpayer insists that it is mandatory for the Commissioner to give notice of the deficiency by registered mail only. (Br. 6.)

We submit that the word "authorized" as used by Congress in Section 272 (a) (1) of the 1939 Code is a permissive word at most, that is, it plainly gives the Commissioner leave to exercise the right thus afforded him by the statutory authorization, to the end that if he chooses to use the registered-mail method of sending the notice of deficiency, he is thereby reasonably certain of its delivery to and service upon the taxpayer. From the earliest time when the initial forerunner of this section was first enacted by Congress in Section 274 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, the legislative history thereof shows that the effective delivery to and service on the taxpayer of the Commissioner's statutory notice of his final determination of deficiency constitutes the real criteria and the end result designed to be

^s See footnote 2, *supra*.

effected thereby. It clearly shows that the sole purpose of the statute was to make sure that the taxpayer would certainly be notified of the deficiency thus determined and asserted by the Commissioner in order that he would, in turn, be given full opportunity timely to exercise his statutory right of petitioning the Tax Court, within the period allowed therefor as set forth in the notice, for a redetermination of the deficiency, if he chose. This is part and parcel of the same purpose which impelled Congress to modify the taxing statutes, beginning with the 1928 Act (Section 272 (k)), authorizing the Commissioner to send the deficiency notice by registered mail to the taxpayer at his last known address, as already shown.

The use of the word "authorized"—instead of directive terminology—in the statute (Section 272 (a) (1)) by Congress, as shown by the legislative history thereof, clearly may not properly be construed to mean, nor does the statute specify or require, that the Commissioner, upon determining a deficiency, *must* serve the notice thereof on the taxpayer solely by registered mail. It is plain, moreover, that the authorization thus given the Commissioner in the statute does not in anywise *limit* his right of mailing deficiency notices to a particular mode (registered mail), to the exclusion of any other mode deemed feasible by the Commissioner (ordinary mail, manual delivery by revenue agent personally, etc.), at the expense thereby of invalidating the deficiency notice, as the Board of Tax Appeals, in construing Section 272 (a) of the Revenue Act of 1936, c. 690, 49 Stat.

1648, improperly held in *John A. Gebelein, Inc. v. Commissioner*, 37 B. T. A. 605, 606.⁹ On the contrary, it is clear that by no possible construction, definition or connotation of the word “authorized,”¹⁰ can it properly be said to “limit”¹⁰ the Commissioner’s right thus given him by the statute to a particular mode of serving the deficiency notice on the taxpayer. The Commissioner, by the permissive terms of Section 272 (a), is plainly not confined or restricted to the use of registered mail in sending out the notice of deficiency but rather, by clear implication, he is thereby clothed with the legal authority, power and right to use any other method, not expressly excepted or prohibited by the terms of the statute, *effectively* to serve the deficiency notice on the taxpayer. *Dolezilek v. Commissioner*, 212 F. 2d 458, 459–460, 462 (C. A. D. C.) (deficiency notice sent first by registered mail, refused by addressee and returned to sender by postal authorities, and redelivered manually to tax-

⁹ This erroneous construction in the *Gebelein* case, cited and relied on by the taxpayer (Br. 7), was followed by the Board (later the Tax Court) in subsequent cases, such as *Day v. Commissioner*, 12 B. T. A. 161, 163; *Block v. Commissioner*, 2 T. C. 761, 762; *Midtown Catering Co. v. Commissioner*, 13 T. C. 92, 95; *Hamilton v. Commissioner*, 13 T. C. 747, 749, all of which are cited and relied on by the taxpayer here (Br. 7–8).

¹⁰ Webster’s New International Dictionary (2d ed., 1949), defines these words as follows (pp. 186, 1434) :

Authorize: 1. To clothe with authority, or legal power; to give a right to act; 2. * * *. b To give authoritative permission to or for; to empower; warrant * * *.

Limit: 1. To assign to or within certain limits; to fix, constitute, or appoint definitely; to allot * * *. 2. To apply a limit to, or set a limitation or bounds.

payer by revenue agent in person). Nor is there any basis or authority, other than its own, for the Tax Court's construction thereof (Br. 8) in *Hamilton v. Commissioner*, 13 T. C. 747, 749, where—though conceding that the initial provisions of Section 272 (a) of the 1939 Code which “authorized” the Commissioner's sending the deficiency notice by registered mail “by terms * * * appears to be permissive”—it nevertheless held that the provisions of that section which follow purportedly “indicate that such procedure is mandatory, if the tax is to be finally determined and collected.” That this does not follow at all is clearly shown by the remaining provisions of Section 272 which fail to disclose, as pointed out, anything remotely indicating, much less showing, that the registered mail procedure, as “authorized” by Congress therein, was intended to be exclusive and therefore mandatory. On the contrary, this conclusion of the Tax Court certainly cannot be correct, indeed it would defeat the purpose of the statute, “if [thereby] the tax is to be finally determined and collected,” as the Tax Court put it (p. 749). This is clearly shown by *Dolezilek v. Commissioner*, *supra*, where the registered mail method—registered deficiency notice refused by taxpayer upon receipt, returned to sender, and re-served on her by the revenue agent personally—proved to be wholly insufficient and ineffective for the collection of the tax as finally determined and asserted by the Commissioner there. The fallacy of the Tax Court's above-mentioned decisions in this respect is shown very clearly by the legislative history

of the corresponding provisions of earlier statutes, forerunners of Section 272 (a) (1) of the 1939 Code, dealt with below.

The first statute corresponding to Section 272 (a) (1) of the 1939 Code was enacted as Section 274 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, wherein Congress, upon establishing the Board of Tax Appeals by Section 900 of that Act, provided in Section 274 (a) that if the Commissioner determined that there was a deficiency in tax for any taxable year, then “the taxpayer * * * *shall be* notified of such deficiency by registered mail”, from which the taxpayer, in turn, was entitled to file an appeal with the Board within 60 days after such notice was mailed by the Commissioner. [Italics supplied.] Likewise, Section 279 (b) of the 1924 Act provided that if the taxpayer filed a claim in abatement of a jeopardy assessment made by the Commissioner, then the Commissioner, upon receipt of the claim from the Collector, “*shall* by registered mail notify the taxpayer of his decision on the claim,” within 60 days after the mailing of which the taxpayer could appeal therefrom to the Board. (Italics supplied.) Thus, those initial provisions of the 1924 Act, specifying the particular mode in which the Commissioner *shall* send out his notices of deficiencies, appear clearly to have included the negation of any other mode, and consequently the registered-mail method was mandatory under that Act.¹¹ *Botany*

¹¹ The legislative history of Sections 274 (a) and 279 (b) of the 1924 Act indicates nothing to the contrary. H. Rep. No. 179, 68th Cong., 1st Sess. pp. 62, 64 (1924) (1939-1 Cum. Bull. (Part 2) 241, 258, 260); S. Rep. No. 398, 68th Cong., 1st Sess. pp. 30-31, 32-33 (1924) (1939-1 Cum. Bull. (Part 2) 266, 287, 289).

Mills v. United States, 278 U. S. 282, 289. By the specific terms of the statute, the Commissioner could then send out his deficiency notices by registered mail *only*. The Third Circuit so held in *Heinemann Chemical Co. v. Heiner*, 92 F. 2d 344, 346-347, in respect of the Commissioner's action there on the taxpayer's abatement claim under Section 279 (b) of the 1924 Act which, as shown, used substantially the same language as Section 274 (a) in respect of the Commissioner's sending out notices of deficiencies.

These mandatory provisions as appearing in the 1924 Act, however, were specifically deleted, modified and liberalized for later years, beginning with Section 274 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9. That section provided specifically that the Commissioner, upon determining a deficiency, "is *authorized* to send notice of such deficiency to the taxpayer by registered mail,"¹² from which the taxpayer could appeal to the Board of Tax Appeals within 60 days after such mailing. [Italics supplied.] The legislative history of this enactment of Section 274 (a) shows very clearly, in respect of the requisite procedure thereafter to be followed in the case of the determination and assertion of a deficiency in tax, that "the commissioner can take no action to assess and collect a deficiency [unless and] until he has

¹² The same provisions have been continued in the successive Revenue Acts up to the present time. Section 272 (a) of the Revenue Acts of 1928, c. 852, 45 Stat. 791; 1932, c. 209, 47 Stat. 169; 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648; 1938, c. 289, 52 Stat. 447; Internal Revenue Code of 1939 (Appendix, *infra*); and Sec. 6212 (a) of the Internal Revenue Code of 1954 (Appendix, *infra*).

mailed to the taxpayer a notice of the deficiency * * *,” as authorized by the newly-worded law.¹³ Thus, beginning with the 1926 Act, the statute, as changed—instead of *requiring* the Commissioner to send out deficiency notices by registered mail, as theretofore under the 1924 Act—thereafter *authorized* the Commissioner, liberally and broadly in his discretion, to send out and serve on taxpayers his notices of deficiencies, either by registered mail or by any other *effective* means (ordinary mail, manual delivery, etc.) as deemed best by him to be most practicable and/or feasible under the circumstances of each case. This, as already pointed out, was designed to make reasonably certain that *in any event* the taxpayer in each case would surely receive the notice of deficiency in order to afford him timely and full opportunity to perfect and file a petition for the redetermination thereof with the Board of Tax Appeals (now the Tax Court), if he chose to do so. *Dolezilek v. Commissioner*, 212 F. 2d 458, 459–460, 462 (C. A. D. C.).

If the foregoing were not true, there could have been no possible reason, necessity or occasion—and the taxpayer shows none—for the newly-adopted permissive provision enacted by Congress by the specific different wording used in Section 274 (a) of

¹³ S. Rep. No. 52, 69th Cong., 1st Sess., pp. 26–27 (1926) (1939–1 Cum. Bull. (Part 2) 332, 352) and H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 39 (1926) (1939–1 Cum. Bull. (Part 2) 361, 368), rewriting Section 274 (a) of the House bill (H. Rep. No. 1, 69th Cong., 1st Sess., pp. 10–11 (1925) (1939–1 Cum. Bull. (Part 2) 315, 321–322)), to conform to the Senate amendment thereto, *supra*.

the 1926 Act. Indeed, this amendment must necessarily have been designed to forestall the failure of effective service upon and delivery to taxpayers of deficiency notices because of unforeseeable circumstances by registered mail, as shown by the decision in *Dolezilek v. Commissioner, supra*, where delivery of the Commissioner's deficiency notice sent by registered mail was prevented—as indeed in many cases—by circumstances unforeseen and only the ultimate manual delivery thereof by a revenue agent proved effective. The situation in the *Dolezilek* case, is, indeed, comparable to the situation in the instant case where the deficiency notice was held valid by the District Court where it was first sent to the taxpayer by the Commissioner by registered mail, returned to the Commissioner by the postal authorities, and thereafter remailed to the taxpayer by ordinary mail, which he admittedly received on the next day after the remailing. In both of these instances, registered mail proved ineffective and therefore the Commissioner was obliged, under his statutory authorization, to serve the deficiency notices upon the respective taxpayers by other means which would be, *and were*, effective within the contemplation of the statute. Nor did the taxpayer contend to the contrary in the District Court, never once objecting below to the validity of the Commissioner's notice of deficiency in question which, after being mailed to him first by registered letter and returned (undelivered) by the postal authorities, was remailed to him by ordinary mail on April 14, 1955, and never once contending that the latter notice was

defective on the ground that it could properly have been sent to him by the Commissioner *only* by registered mail, as here contended for the first time. (R. 4-9, 23; Br. 5-9.) In any event, the facts heretofore disclosed (footnote 7, *supra*) fully support, indeed compel, the inference and conclusion that the taxpayer actually received the first deficiency notice sent him by the Commissioner by registered mail on March 11, 1955—not denied by the taxpayer, as pointed out—which, upon being returned to the sender by the postal authorities, the Commissioner remailed to him by ordinary mail on April 14, 1955, which he admittedly received on the next day.¹⁴ Hence, that was clearly sufficient to meet the requirements of Section 272 (a) (1) of the statute. *Dolezilek v. Commissioner*, *supra*; compare *Commissioner v. Rosenheim*, 132 F. 2d 677 (C. A. 3d); *Clark's Estate v. Commissioner*, 173 F. 2d 13 (C. A. 2d); *Commissioner v. Stewart*, 186 F. 2d 239 (C. A. 6th).

Dolezilek v. Commissioner, 212 F. 2d 458, 459-460 (C. A. D. C.), cited but not distinguished by the taxpayer (Br. 9), is a case squarely in point. There the Commissioner on March 11, 1952, sent the taxpayer by registered mail a properly addressed statutory 90-day notice of deficiency covering years 1946-1950, as authorized by Section 272 (a) (1) and (k) of the

¹⁴ Hence, contrary to his contention (Br. 11-12, 14), the taxpayer very clearly was not deprived of his right of timely petitioning the Tax Court for a redetermination of the Commissioner's final determination of deficiency in tax and penalty, as disclosed by the Commissioner in the notice of deficiency finally and *effectively* delivered to the taxpayer. He merely never exercised that right (R. 33-34).

1939 Code, which was returned to the sender by the postal authorities stamped "Not claimed—Refused". The deputy collector thereupon personally served the deficiency notice on the taxpayer on April 25, 1952; that is, 45 days after it had been mailed to her. She thereafter filed with the Tax Court a petition for redetermination of the deficiency asserted therein, more than 90 days after the notice was originally mailed on March 11, 1952, but less than 90 days after manual delivery thereof by the deputy collector. In these circumstances, the Commissioner moved the Tax Court to dismiss the case for lack of jurisdiction, urging the expiration of the 90-day period of limitations for appeal, and the Tax Court, granting the motion, entered an order of dismissal accordingly, from which the taxpayer appealed. The appellate court, rejecting the taxpayer's claim that she had been misled by the manual delivery of the deficiency notice and believed that she had 90 days from the date of such delivery in which to appeal to the Tax Court, held that the 90-day statutory period for filing the petition for redetermination with the Tax Court was properly computed from the date of mailing the first notice, rather than from the date of the subsequent personal service thereof on the taxpayer by the deputy collector. The court stated (pp. 459-460):

The statute flatly says that a petition may be filed with the Tax Court within ninety days "after such notice is mailed." It makes no provision for manual delivery or for the computation of the ninety-day period from the date of such delivery. It specifically provides that

“notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter * * *.” Petitioner had, we think, no cause for confusion. Moreover, after her receipt of actual notice she could have made a timely filing in the Tax Court: some forty-five of the ninety days were left, and there is no suggestion that this was not ample.

We hold, therefore, that where a taxpayer receives actual notice of deficiency during the ninety-day period, and has adequate time remaining within that period for preparing and filing his petition, he is not entitled to compute the period from a date other than that of mailing. We need not say what result would follow if actual notice is never received, or where the time remaining is inadequate. We decide only the present case. And we note that our holding here does not leave petitioner without remedy. A taxpayer, after a deficiency has been collected, can claim a refund of the amount collected and if necessary can file suit on the refund claim.

The dissenting Judge (Miller), though disagreeing with the majority in that he felt that the taxpayer should have had 90 days in any event, not after the mailing of the deficiency notice as the statute provides but after the actual delivery of the document to her, within which to file the petition for redetermination with the Tax Court, nevertheless cast further light on the problem of statutory notice of deficiencies by pointing out, in agreement with the majority, that (p. 462) :

Section 272 does not, as the majority say, provide for manual delivery. But such delivery is not forbidden, and the use of registered mail is not made exclusive. The essential thing is that the taxpayer have notice, and not that he have it in any particular way.

Finally, it will be noted that this Court and other circuits have held that where an incorrectly addressed deficiency notice is mailed by the Commissioner by registered letter, received by the taxpayer and used by him as a basis for filing a timely petition with the Tax Court, such notice is a sufficient compliance with the statute, any defects in the address being considered as waived by the filing of the petition. *McCarthy Co. v. Commissioner*, 80 F.2d 618 (C. A. 9th), certiorari denied, 296 U. S. 655; *Kay Mfg. Co. v. Commissioner*, 18 B. T. A. 753, affirmed, 53 F. 2d 1083 (C. A. 2d); *Wright v. Commissioner*, 34 B. T. A. 84, affirmed, 101 F. 2d 309 (C. A. 4th). In these circumstances, no valid reason appears as to why the same result should not obtain where the taxpayer actually receives and accepts the deficiency notice, even though allegedly sent him improperly by ordinary mail as here, whether or not he chooses to use it as a basis for filing a petition for redetermination with the Tax Court. In either case, the taxpayer's actual receipt of the deficiency notice *with the statutory right* to appeal therefrom to the Tax Court is clearly the test under the terms of the statute, as shown. As previously pointed out, moreover, whether or not he elects to exercise that right is plainly immaterial. So long as the taxpayer actually receives the deficiency notice,

whether sent to and served upon him by the Commissioner, under his statutory authorization provided in Section 272 (a) (1), by registered mail, or by ordinary mail, personal service by a revenue agent or otherwise if he so chooses, the statutory requirements and purpose have been clearly met, as heretofore shown. *Dolezilek v. Commissioner, supra* (pp. 459–460, 462).

Heinemann Chemical Co. v. Heiner, 92 F. 2d 344 (C. A. 3d), cited and relied on heavily by the taxpayer (Br. 8–9, 13), is clearly distinguishable. There, as pointed out, the Third Circuit held that Section 279 (b) of the 1924 Act requiring that the taxpayer “shall be” notified by registered mail in respect of the Commissioner’s action taken on his abatement claim was mandatory. But, as also shown, that statute—and also Section 274 (a) of that Act containing the same registered-letter mailing requirement as to deficiency notices—was changed by the 1926 Act thereafter authorizing the Commissioner to send notices of deficiencies to taxpayers by registered mail and/or otherwise, within his discretion. *Dolezilek v. Commissioner, supra*. Nor, as heretofore shown (footnote 9, *supra*), do any of the decisions of the Board of Tax Appeals and the Tax Court, cited by the taxpayer (Br. 7–9), help his case.

The foregoing, we submit, fully supports our position that the statutory authorization contained in Section 272 (a) (1) of the 1939 Code, beginning with the 1926 Act and continuing up to the present time, is necessarily a permissive one purposely designed and enacted by Congress to permit the Commissioner, in his discretion, to send out and effectively serve upon

taxpayers his deficiency notices not only by registered mail but also by other means (ordinary mail, manual delivery, etc.) which may prove expedient, advisable and/or necessary according to the unforeseeable and unknowable circumstances with which that official, faced with the prodigious task of processing millions of tax returns as filed for each taxable year, is confronted in a very high percentage of such cases. Moreover, this, unquestionably, is a fair and reasonable interpretation in that giving effect thereto will anticipate and preclude many taxpayers' transparent attempts to circumvent the statute purely on technicalities, as here, to the detriment of the other taxpayers not so minded.

3. The taxpayer failed to pursue and exhaust his statutory administrative remedies for determination of the propriety of the deficiencies in tax and fraud penalty as asserted and assessed against him by the Commissioner, and therefore for this and other reasons he is not entitled to injunctive relief

The taxpayer contends that it was not necessary for him to have filed a petition with the Tax Court for redetermination of the deficiencies involved before seeking injunctive relief on the ground that the deficiency notice in question was not a notice of final determination of deficiency sent him by the Commissioner by registered mail as authorized by the statute, and since it was sent to him by ordinary mail it was allegedly ineffective for any purpose; hence, he asserts he has no administrative remedy to exhaust and that he is therefore granted the right by statute to seek injunctive relief. (Br. 13-14.) We have already shown that the Commissioner's statutory notice of deficiency and the assessment made pursuant thereto

were timely and proper under the applicable provisions of the statute. Hence, it is clear, that, contrary to the taxpayer's contentions, he is not entitled to injunctive relief for, among other reasons discussed below, he failed, as the District Court held (R. 35-36), first to pursue and exhaust his available statutory administrative remedies for determination of the propriety of the assessment in question.

Since, as shown, the assessment was timely and properly made by the Commissioner because the tax and penalty, stemming from the taxpayer's false and fraudulent tax return as alleged in the Commissioner's deficiency notice (R. 19-22, 35), could be assessed at any time under the provisions of Section 276 (a) of the 1939 Code, it follows that the taxpayer's suit to restrain the collection of the tax is barred by Section 7421 (a) of the Internal Revenue Code of 1954 (formerly Section 3653 (a) of the 1939 Code), which provides that "Except as provided in sections 6212 (a) and (c), and 6213 (a) [formerly Section 272 (a) (1) of the 1939 Code], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". This enactment forbids, in sweeping language, the issuance of an injunction to restrain the collection of taxes under color of office and without arbitrary or capricious action, as is clearly the case here. *Graham v. duPont*, 262 U. S. 234; *Bailey v. George*, 259 U. S. 16; *Dodge v. Osborn*, 240 U. S. 118; *Cadwallader v. Sturgess*, 297 Fed. 73, 75-76 (C. A. 3d), certiorari denied, 265 U. S. 584.

An examination of the record readily discloses that the taxpayer did not allege in his complaint below

(R. 3-9) nor has he shown upon appeal here (R. 71-72; Br. 13-14), any facts or grounds in any wise sufficient to warrant the circumvention of the broad provisions of Section 7421 (a) which, with two exceptions, preclude any action to restrain the assessment or collection of any federal taxes. It is clear from what we have already said under subheading A of this brief, *supra*, that the taxpayer has failed to bring his case within either of the two exceptions specified in that subsection of the statute, that is, he has failed to show (a) that the Commissioner did not meet the requirements of the statutory authorization provided by Section 6212 (a) of the 1954 Code (Appendix, *infra*)¹⁵—derived from, and for present purposes identical in requirements with, Section 272 (a) (1) of the 1939 Code, previously discussed in detail under subdivision A of this brief, *supra*—in sending and serving upon the taxpayer at his last known address a timely statutory notice of deficiency, and (b) that he ever availed himself of his right, under Section 6213 (a) of that Code (Appendix, *infra*)—also derived from and for present purposes identical in requirements to Section 272 (a) (1) of the 1939 Code—of filing a petition for redetermination of the deficiencies in question within 90 days after the Commissioner sent him the statutory notice of such deficiencies on April 14, 1955, which, as shown he received on the next day. (R. 34.)

In these circumstances, it is clear that the Commissioner's assessment of deficiency in tax and fraud

¹⁵ Subsection (c) of Section 6212 of that Code has no relevancy here.

penalty on July 22, 1955 (R. 33)—that is, several days after the expiration of the taxpayer's statutory 90-day appeal period of which he was apprised in the Commissioner's deficiency notice (R. 19-20)—was timely and proper for the reason that fraud was alleged and asserted by the Commissioner in that deficiency notice under Section 293 (b) of the 1939 Code (R. 35). In such event, the tax, fraud penalty and statutory interest could, as the District Court held (R. 35), be assessed "at any time" under Section 276 (a) of the 1939 Code, without regard to the regular 3-year statute of limitations otherwise applicable. Accordingly, it is also clear, as the District Court held (R. 34, 35-36), that the taxpayer failed to pursue and/or exhaust the statutory administrative remedies available to him, not only in the foregoing respect, but also by virtue of his failing to pay the deficiencies in question and thereupon maintaining an action so as to judicially determine their validity upon the basis of a claim for refund for recovery of the deficiencies after payment, either in the Federal District Court or in the Court of Claims, under 28 U. S. C., Section 1340. This, we submit, is fatal to the taxpayer's case. *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 543-545; *United States v. Edward Valves, Inc.*, 207 F. 2d 329, 330-333 (C. A. 7th), certiorari denied, 347 U. S. 934, citing the *Macauley-Waterman S. S. Corp.* case, and also *Lichter v. United States*, 334 U. S. 742, as well as *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U. S. 752. In the latter case, the Supreme Court appropriately stated (p. 767) that—

The doctrine [of first resorting to administrative remedies], wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

To the same effect, where injunctions against distraint were denied, see *Bashara v. Hopkins*, 295 Fed. 319, 321 (C. A. 5th), certiorari denied, 265 U. S. 584; *Seaman v. Bowers*, 297 Fed. 371, 375-376 (C. A. 2d), citing *Cadwallader v. Sturgess*, 297 Fed. 73 (C. A. 3d), certiorari denied, 265 U. S. 584, and *Sigman v. Reinecke*, 297 Fed. 1005 (C. A. 7th), certiorari denied, 264 U. S. 597; *Hernandez V. McGhee*, 294 Fed. 460, 466-467, following *Graham v. du Pont*, 262 U. S. 234. It follows, we submit, that the court below properly held that because the taxpayer had not pursued and exhausted his available administrative remedies as provided in the pertinent statutes, it was without jurisdiction of this action under Section 7421 (a) of the 1954 Code, and that taxpayer's suit must be dismissed with the denial of the injunctive relief prayed for by him. (R. 35-36.)

However, notwithstanding the broad provisions of Section 7421 (a) forbidding the issuance of injunctive restraint against assessment and collection of taxes, the courts will enjoin assessment and collection in order to protect the rights of taxpayers where their remedy at law to recover taxes illegally assessed or collected is inadequate, or where there exist extraor-

dinary or exceptional circumstances (irreparable damage) bringing the case within the realm of equitable jurisdiction. *Rickert Rice Mills v. Fontenot*, 297 U. S. 110, rehearing denied, 297 U. S. 726; *Miller v. Nut Margarine Co.*, 284 U. S. 498; *Allen v. Regents*, 304 U. S. 439; *Berry v. Westover*, 70 F. Supp. 537 (S. D. Cal.); *Martin v. Andrews* (S. D. Cal.), decided May 13, 1955 (1955 P-H, par. 72,876), (1955 C. C. H., par. 9615); *Midwest Haulers, Inc. v. Brady*, 128 F. 2d 496 (C. A. 6th); *J. M. Hirst & Co. v. Gentsch*, 133 F. 2d 247 (C. A. 6th). The taxpayer's mere recitation, however, of such conclusions as alleged in his complaint, namely, "Immediate and irreparable injury, loss and damage will result to plaintiff if defendant should levy upon, seize and sell plaintiff's property" (R. 8), without any proof thereof—and there is none (Br. 13-14)—is clearly not sufficient to enable him to prevail here. *Berry v. Westover*, *supra*; *Martin v. Andrews*, *supra*; *Acklin v. Peoples Savings Assn.*, 293 Fed. 392 (N. D. Ohio); *Broadway Building Corp. v. Sugden*, 2 F. Supp. 837 (W. D. N. Y.). Accordingly, it is clear that the taxpayer has failed to allege any facts in the complaint (R. 3-9), or to show anything further here upon appeal, which would or could support an injunction based on the above-mentioned exceptions.

In these circumstances, we submit that the District Court properly dismissed the taxpayer's suit to restrain the Commissioner's assessment or collection of the tax, penalty and statutory interest in question and thereupon properly granted judgment for the

Government on the grounds that it lacked jurisdiction over the subject matter of the action, the suit being barred by section 7421 of the 1954 Code, and that the complaint failed to state a claim against the Director upon which relief could be granted.

CONCLUSION

The judgment of the District Court is correct, and should therefore be affirmed upon review by this Court.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 272 [as amended by Sec. 203, Act of December 29, 1945, c. 652, 59 Stat. 669]. PRO-
CEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the

joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(k) *Address for Notice of Deficiency.*—In the absence of notice to the Commissioner under section 312 (a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(26 U. S. C. 1952 ed., Sec. 272.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U. S. C. 1952 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U. S. C. 1952 ed., Sec. 276.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so

assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 1952 ed., Sec. 293.)

Internal Revenue Code of 1954:

SEC. 6212. NOTICE OF DEFICIENCY.

(a) *In General*.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail

(b) *Address for Notice of Deficiency*.—

(1) *Income and gift taxes*.—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

(c) *Further Deficiency Letters Restricted*.—

(1) *General rule*.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214 (a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213 (b) (1) (relating to mathematical errors), or in section 6861 (c) (relating to the making of jeopardy assessments).

(26 U. S. C. 1952 ed., Supp. II, Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6213.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)



